Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

STEUBENVILLE CITY SCHOOLS; RICHARD LUCCI; DANIEL SPAHN; RUTH ANN BRUZZESE; WILLIAM KERR; WILLIAM HENDRICKS; RICHARD BEAL,
Petitioners,

v.

PATRICK BARRETT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding that Richard Lucci is not entitled to qualified immunity as to Patrick Barrett's claim brought under 42 U.S.C. § 1983. The basis for the Sixth Circuit's decision was a finding that (1) Barrett has alleged a violation of a constitutionally or statutorily protected right, and (2) the right was clearly established in the law such that a reasonable government official would have realized that his or her action was in violation of that right. The Sixth Circuit's decision presents three questions for review:

I. Is the Sixth Circuit in conflict in not recognizing the balancing test established by the Fifth and Eleventh Circuits, and by this Court, in determining whether the right in question is clearly established?

II. Can a reasonable school superintendent, in the absence of Sixth Circuit and Supreme Court precedent, be expected to know that two complicated constitutional principles, combined with a complex legal balancing test, place him on notice that his conduct may be unlawful?

III. For the purposes of a qualified immunity inquiry in the context of an action brought under 42 U.S.C. § 1983, does a plaintiff show a violation of a constitutionally or statutorily protected right where that right is not alleged in the complaint and where the plaintiff only makes passing reference to the right in a reply brief filed in opposition to a motion for summary judgment?

LIST OF PARTIES

The Parties to this case are Steubenville City Schools, Richard Lucci in His Individual Capacity Only, Daniel Spahn in his Official Capacity Only, Ruth Ann Bruzzese in her Official Capacity Only, William Kerr in his Official Capacity Only, William Hendricks in his Official Capacity Only and Richard Beal in his Official Capacity Only, all appearing as Petitioners. Richard Lucci is the Superintendent of Steubenville City Schools. Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks and Richard Beal are individual board members of the Steubenville City Schools. Respondent is Patrick Barrett.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Barrett v. Steubenville City Schools*, 388 F.3d 967 (6th Cir. 2004). *See* Appendix B, 3a. Petitioners sought before the Sixth Circuit a Rehearing *En Banc*, which petition was denied by a two to one vote of the panel in an unreported opinion. *See* Appendix A, 1a. The Sixth Circuit's decision, by a two to one vote, affirmed the unreported decision of the United States District Court for the Southern District of Ohio, Eastern Division, granting in part and denying in part Petitioners' Motion for Summary Judgment. *See* Appendix C, 21a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Supreme Court Rules 10(a) and 10(c), as the United States Court of Appeals for the Sixth Circuit has entered a decision in conflict with the decisions of other United States Courts of Appeal on the same important matter, and has decided an important federal question in conflict with relevant decisions of this Court.

The Sixth Circuit's decision was rendered November 15, 2004. Petitioners timely sought a Rehearing *En Banc* before the Sixth Circuit. The Petition for Rehearing *En Banc* was denied by way of the Sixth Circuit's Order dated January 18, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983.Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

Petitioners' Appeal to the Sixth Circuit was an interlocutory appeal, filed following the District Court's denial of qualified immunity as to Petitioner Lucci. A defendant who wishes to file an appeal after being denied qualified immunity should be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the case. *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998). Petitioners have therefore accepted as true, only for the purposes of appeal to the Sixth Circuit and to this Court, the facts alleged in Respondent's Complaint.

In January 1999 Respondent became a long-term substitute teacher in the Steubenville City School system. Respondent

eventually sought a full time teaching position with Steubenville City Schools. Respondent alleges he was denied a full time teaching position with Steubenville City Schools because Respondent's son, Tyler Barrett, was enrolled in a Catholic School.

Respondent's allegations are that, sometime in May 1999, Principal John Holub, an employee of Steubenville City Schools, represented to Respondent that Petitioner Lucci was impressed with Respondent's qualifications. Mr. Holub added that, in spite of Respondent's qualifications, Respondent would not be hired as a full time teacher because Respondent's son attended Catholic school. At various times during the 1999-2000 school year, Petitioner Lucci and others represented to Respondent that the Steubenville City School board wanted Steubenville City Schools teachers to enroll their children in Steubenville City Schools. Principal Holub again represented to Respondent that Petitioner Lucci would not hire Respondent unless Respondent enrolled his son in Steubenville City Schools. Petitioner Lucci explained to Respondent that the school board liked for teachers to enroll their children in the public school system because it "looked good" to parents whose children attend the public schools.

When Respondent refused to enroll his son in Steubenville City Schools, Respondent was removed from Respondent's classroom for three days. This three day removal had the effect of preventing Respondent from accumulating 60 consecutive days of substitute teaching in the same classroom. Had Respondent accumulated the 60 consecutive days of teaching, Respondent would have qualified for a full year's contract. In addition, Respondent was denied full time teaching positions which became available in Steubenville City Schools. Respondent alleges that these positions were filled with lesser qualified candidates.

Respondent ultimately elected to enroll his son in Steubenville City Schools. Allegedly, Petitioner Lucci thereafter promised Respondent a full time contract, available upon Respondent's completion of 60 days of substitute teaching. At the beginning of the 2000-2001 school year, Respondent did not send his son to Steubenville City Schools, but rather elected to return his son to Catholic school. Allegedly, Principal Melinda Young represented to Respondent that Respondent would not be awarded a full time contract if Respondent's son remained in Catholic school. When Respondent refused to send his son to Steubenville City Schools, Petitioner Lucci accused Respondent of being disloyal and terminated Respondent.

B. Procedural History

On or about May 21, 2001, Respondent filed his first Complaint in the United States District
Court for the Southern District of Ohio, Eastern Division. Respondent's Complaint was amended twice. The Second Amended Complaint, filed on or about July 16, 2001, governs Respondent's Claims. For the sake of simplicity, the Second Amended Complaint will be referred to as the "Complaint."

Respondent's Complaint named as Defendants the following: Steubenville City Schools; Richard Lucci, in his individual capacity only; Daniel Spahn, in his official capacity only; Ruth Ann Bruzzese, in her official capacity only; William Kerr, in his official capacity only; William Hendricks, in his official capacity only; and Richard Beal, in his official capacity only. Petitioner Richard Lucci is the Superintendent of Steubenville City Schools. Petitioners Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks and Richard Beal are individual board members of the Steubenville City Schools.

Respondent's Complaint alleged that, beginning in January 1999, Respondent was a substitute teacher for the Steubenville City Schools. Respondent alleged that he was denied a full time position as a teacher in the Steubenville City School system because Respondent's son was enrolled in a Catholic school. Respondent alleged that Petitioner Lucci and other school officials represented to Respondent that Respondent would not be hired as a full time teacher unless Respondent's son was enrolled in the Steubenville City School system. Respondent further alleged that he was repeatedly thwarted in his attempt to obtain a full time teaching position because Respondent's son was not enrolled in Steubenville City Schools. Respondent stated that he was eventually terminated from his employment as a substitute teacher because of his refusal to enroll his son in Steubenville City Schools.

Respondent's Complaint alleged that the conduct complained of constitutes a violation of Respondent's Civil Rights as protected by 42 U.S.C. § 1983. Specifically, Respondent alleged that Petitioners' conduct violated his First Amendment right to freedom of religion and his right to equal protection under the Fifth and Fourteenth Amendments. Respondent further alleged state law claims for breach of contract, promissory estoppel, tortious interference with present and/or prospective contractual relations. Respondent also alleged that Petitioners' conduct constitutes religious discrimination in violation of 42 U.S.C. §2000*e* et. seq. and Ohio Revised Code section 4112.99. Respondent made no allegation of a violation of his right to direct the education of his child.

On December 4, 2002, Petitioners moved for summary judgment on all of Respondents' claims. Petitioners argued that Respondent failed to establish a claim for religious discrimination under 42 U.S.C. § 2000*e* et. seq. or Revised

Code section § 4112.99. Petitioners further argued that Respondent's 42 U.S.C. § 1983 claims should fail as a matter of law. Petitioners contended that Superintendent Lucci was immune from such § 1983 claims pursuant to the doctrine of qualified immunity. Petitioners further contended that Respondent's § 1983 claims were unsubstantiated. Petitioners further sought summary judgment on Respondent's state law claims and some of Respondent's alleged damages.

On September 11, 2003, the District Court issued its opinion and order. The District Court ruled that Petitioners were entitled to summary judgment on Respondent's claims for religious discrimination under 42 U.S.C. §2000*e* et. seq. The District Court further held that Respondent's §1983 claims, that Petitioners' conduct violated his First Amendment right to freedom of religion and his right to equal protection under the Fifth and Fourteenth Amendments, were inadequate as a matter of law. The District Court further granted summary judgment on Respondent's state law religious discrimination claim. The Court found that genuine issues of material fact remained with regard to Respondent's state law claims for breach of contract, promissory estoppel, tortious interference with present and/or prospective contractual relations.

Although the District Court dismissed all of the federal law claims alleged in Respondent's Complaint, the Court concluded that Respondent had alleged a § 1983 claim for a violation of Respondent's parental rights. The District Court found this claim not in Respondent's Complaint, but in one sentence of Respondent's Memorandum Contra Petitioners' Motion for Summary Judgment. The District Court also inferred the § 1983 parental rights claim from the case law cited in Respondent's Memorandum Contra. Having created Respondent's parental rights claim, the District Court ruled

that Respondent still had a viable cause of action under §1983. The District Court further found that Petitioner Lucci was not entitled to qualified immunity for Respondent's newly created parental rights claim under § 1983.The District Court found that Respondent had shown a violation of a constitutionally or statutorily protected right and that the right in question was clearly established such that a reasonable government official would have realized that his or her action was in violation of that right.

Petitioners timely filed an interlocutory appeal in the Sixth Circuit, which appeal was confined to the issue of Petitioner Lucci's qualified immunity. Without scheduling an oral argument, the Sixth Circuit panel affirmed the decision of the District Court by a two to one majority. *See* Appendix B, 3a-20a. Petitioners sought before the Sixth Circuit a Rehearing *En Banc*, which petition was denied by a two to one vote of the original panel in an unreported opinion dated January 18, 2005. *See* Appendix A, 1a. Petitioners now seek relief in this Court.

REASONS FOR ALLOWANCE OF THE WRIT

This Court's cases establish that qualified immunity shields a public employee from suit for damages if a reasonable government official could have believed his conduct to be lawful, in light of clearly established law. *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991), citing *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Because the entitlement is an immunity from suit rather than a mere defense to liability, this Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Hunter*, 520 U.S. at 227. (Citations omitted).

The qualified immunity standard "'gives ample room for mistaken judgments'" by protecting "'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 520 U.S. at 229, citing *Malley v. Briggs*, 475 U.S. 335, 343, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). "This accomodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 520 U.S. at 229, citing *Davis v. Scherer*, 468 U.S. 183, 195, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984).

A court examining a claim for qualified immunity must engage in a two part analysis. The Court "'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether the right in question was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999), citing *Conn v. Gabbert*, 526 U.S. 286, 290, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999). Assuming a plaintiff's complaint can pass the first prong of the immunity analysis, the Court next proceeds to determine whether the right in question was clearly established at the time of the alleged violation. *Wilson, supra.*, 526 U.S. at 609.

Question One. Is the Sixth Circuit in conflict in not recognizing the balancing test established by the Fifth and Eleventh Circuits, and by this Court, in determining whether the right in question is clearly established?

As noted above, the Sixth Circuit affirmed, against a strong dissent, the District Court's finding that Petitioner Lucci is not entitled to qualified immunity as to Respondent's claim brought under 42 U.S.C. § 1983. The basis for the Sixth Circuit's decision was the finding that (1) Barrett has

alleged a violation of a constitutionally or statutorily protected right, and (2) the right was clearly established in the law such that a reasonable government official would have realized that his or her action was in violation of that right. See, Appendix B, 11a-16a.

The Sixth Circuit's decision in this regard is not based upon any precedent directly on point. Rather, the Court reasoned that (1) parents have a fundamental right to raise their children and (2) one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. *Id.* These two principles, the Sixth Circuit reasoned, necessitate the conclusion that any reasonable official would know that denying employment based upon a parent's constitutional right to direct his child's education is a violation of the law. *Id.*

The above two conclusions about the state of the law represent over-generalizations of constitutional principles. The Sixth Circuit's analysis is in conflict with the balancing test that this Court has required when passing on the constitutional rights of public employees. In addition, the Sixth Circuit's decision is in conflict with the fact that the same balancing test has been applied by Circuit Courts determining whether a particular employment decision, made as a result of a public school employee's choice to privately educate his or her child, is unconstitutional. As such, the Sixth Circuit applied the wrong analysis in determining whether the right in question is clearly established.

First, this Sixth Circuit over-stated the breadth of a parent's right to direct his or her child's education. This Court's precedent establishes that while parents have the fundamental right to direct their children's education, the right is subject to limitations. *See*, *Wisconsin v. Yoder*, 406

U.S. 205, 233, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) (recognizing that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State).

In addition, the Sixth Circuit misconstrues the law in holding that "one's participation in constitutionally protected activity cannot be the sole basis for denying public employment." This Court's precedent teaches that, while a public employee may still exercise his or her constitutional rights, there are circumstances in which a public employer may prevent participation in constitutionally protected activity, and even terminate an employee for otherwise constitutionally protected activity. *See*, *Kelley v. Johnson,* 425 U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976) (upholding police regulations relative to length of a police officer's hair and other personal grooming matters, despite the freedom of expression); and *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714, 135 L Ed. 2d 834, 116 S. Ct. 2353 (1996), (further citations omitted), (recognizing that government officials may discharge public employees for refusing to support a political party or its candidates if political affiliation is a reasonably appropriate requirement for job in question).

In the more specific context of teachers exercising their constitutional rights, this Court has held that a teacher's interest in exercising his or her rights must be balanced against the State's interest in promoting the efficiency of the public services it provides. *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Indeed, the few Courts that have specifically decided whether

it is unlawful to deny public employment based upon the decision to send one's child to private school have all employed a balancing test. *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984).[1]

Specifically, the Fifth Circuit held that in the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees. *Brantley*, 718 F.2d 1354, 1359 (5th Cir. 1983). (Further citation omitted). The state may legitimately interfere with the constitutionally protected conduct of a public school employee when that conduct materially and substantially impedes the operation or effectiveness of the educational program. *Id.* The state may take an adverse employment action against a public school employee for exercising the right to send his child to private school if the state can prove that the employee's selection of private school materially and substantially affects the state's educational mission. *Barrow*, 332 F.3d 844, 848, citing *Fyfe*.

The *Stough* Court applied the same balancing test as the *Brantley* Court, recognizing that the state may legitimately interfere with the constitutionally protected conduct of a public school employee when that conduct materially and substantially impedes the operation or effectiveness of the educational program. 744 F.2d at 1480, citing *Brantley*, 718

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[1] Following the alleged violation of Respondent's rights, the Fifth Circuit decided another case consistent with its holdings in *Fyfe* and *Brantley*. *See*, *Barrow v. Greenville Independent School Dist.*, 332 F.3d 844 (5th Cir. 2003).

F.2d 1354, 1359. Of note is the fact that the *Stough* Court expressly refrained from passing on the Constitutionality of the school board's policy of prohibiting employees from sending their children to private school. 744 F.2d at 1482. The Court simply held that the Board had produced insufficient evidence to justify the policy's application in that particular case. *Id.*

Nowhere in its decision does the Sixth Circuit recognize or apply the balancing test that applies to the question whether a public employee's constitutional rights have been violated. The Sixth Circuit's analysis fails to acknowledge that its primary legal conclusions are limited in application as described above. It is therefore apparent that the Sixth Circuit erred in basing its decision on the propositions that (1) a parent has an unqualified right to direct his child's education and (2) one's participation in constitutionally protected activity can never be the sole basis for denying public employment. This Court's precedent, and relevant precedent from other Circuits, hold that both legal principles are subject to limitation. As such, the Sixth Circuit is in conflict and erred in reaching its decision based upon such broad propositions of law.

Question Two. Can a reasonable school superintendent, in the absence of Sixth Circuit and Supreme Court precedent, be expected to know that two complicated constitutional principles, combined with a complex legal balancing test, place him on notice that his conduct may be unlawful?

As described above, this case presents an important legal inquiry into a public official's qualified immunity, which necessarily raises complex constitutional questions. But reduced to its core, this case presents a simple question: when Richard Lucci, a school superintendent in Steubenville, Ohio,

sat in his office early in the 2000-2001 school year and decided whether to hire Respondent as a full time teacher, should Superintendent Lucci have known that not hiring Respondent would be a violation of Respondent's constitutional rights?

Applying the Sixth Circuit's analysis, the question for review becomes whether the general principle that (1) a parent has the right to direct his child's education, coupled with the general principle that (2) public employment cannot usually be denied based upon the employee's exercise of constitutional rights, require a reasonable public official to reach the conclusion that (3) a public school cannot require that it's employees enroll their children in the public schools. This analysis must be conducted while mindful of the fact that there is no Sixth Circuit precedent directly addressing the question whether a public school can require that it's employees enroll their children in the public schools, and that there is no Supreme Court precedent answering the same question.[2] As Judge Rogers states in his dissenting opinion, appendix B, at pages 18a and 20a:

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[2] The Sixth Circuit's opinion does reference a previous case in which the issue arose, *Janes v. Bardstown City Sch. Bd. of Ed.*, 97 F.3d 1452, 1996 U.S. App. LEXIS 24997 (6th Cir. 1996). *See* Appendix B, 16a, at n.6. While the disposition of the case does appear in table format in the Federal Reporter, the Court's decision in *Janes* remains unreported in the Sixth Circuit. By its own rules, reliance upon unpublished opinions are "disfavored" by Sixth Circuit, except for the limited purposes of establishing *res judicata*, estoppel, or the law of the case. See, 6 Cir. R. 28(g). As such, it is difficult to see how *Janes* could serve as notice to Petitioner Lucci that his conduct might be unlawful. Furthermore, the *Janes* case was not even decided on the same issue as before this Court.

* * *

> ...And yet, such a right has not been articulated in the Supreme Court or this circuit. Rather, the majority constructs this right from the parts of two others: the fundamental right of a parent to raise his or her children and direct their education, which is clearly established, and a right the majority described as a right not to be denied government employment because of a decision to exercise a fundamentally protected right. This second "right" is not a right in all contexts, and has certainly not been clearly established in the context presented by this case. ...
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> * * *
>
> ...On the facts of this case, it is not clear that "every like-situated, reasonable government agent" would have clearly understood that the right to direct the education of one's children should be combined with a balancing test used to determine what rights a public employer can require a public employee to give up, with the result that a public school cannot require a public school teacher to send his or her child to that public school. Accordingly, Superintendent Lucci should be accorded qualified immunity in this case.

A review of the applicable case law reveals that the Sixth Circuit failed to properly recognize this Court's precedent in addressing the "clearly established" question. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken. *Anderson, supra.*, 483

U.S. at 639, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

In *Anderson*, this Court explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be established." 483 U.S. at 639. "Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The right allegedly violated must be defined at the appropriate level of specificity before a Court can determine if it was clearly established. *Id.* at 641. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition * * * ." *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based upon qualified immunity is appropriate. 533 U.S. at 202, citing *Malley*, *supra*, 475 U.S. at 341.

The Sixth Circuit held below that the right in question was clearly established such that a reasonable government official would have realized that his or her action was in violation of that right, but, as described above, the Court's decision in this regard is not based upon any precedent directly on point. *See* Appendix B, 11a-16a. Rather, the Court reasoned that (1) parents have a fundamental right to raise their children and (2) one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. *Id.* These two principles, the Sixth Circuit reasoned, necessitate the conclusion that any reasonable official would know that denying employment based upon a parent's constitutional right to direct his child's education is a violation of the law. *Id.*

It is apparent that parents have a fundamental right to raise their children. But as noted above, this right is not without limitation. It is similarly apparent that, in most cases, one's participation in constitutionally protected activity cannot be the basis for denying public employment. However, the Sixth Circuit's conclusion that the above two principles combine to place a non-lawyer typical school superintendent on notice that denying employment based upon as employee's decision to privately educate his child, represents a departure from precedent governing the "clearly established" standard. The Sixth Circuit's reasoning conflicts with this Court's decision in *Anderson*, *Saucier* and the multitude of cases that require the "clearly established" standard to be applied only where the right in question is sufficiently clear to a reasonable public official.

The applicable passage from *Anderson* highlights the error of the Sixth Circuit's decision below, as the *Anderson* Court explains that general principles of law, such as those employed by the Sixth Circuit, cannot form the basis for the finding of a clearly established right:

> The operation of this "clearly established" standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness"

> that is the touchstone of *Harlow*. Respondents would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity to a rule of pleading. * * * It should not be surprising, therefore, that our cases establish that the right that the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

483 U.S. 635, 639-640, 107 S. Ct. at 3038-39.

This Court more recently applied the *Anderson* Court's approach in *Saucier*, when it explained that "for instance, there is no doubt that *Graham v. Connor* * * * clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough." *Saucier*, 533 U.S. at 201-02. The Court continued, "we emphasized in *Anderson* that the right that the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202.

In light of the above language in *Anderson* and *Saucier*, it is apparent that the Sixth Circuit's reasoning is in conflict with this Court's precedent. The Sixth Circuit's reasoning that (1) parents have a fundamental right to raise their children and (2) one's participation in constitutionally protected activity

cannot be the sole basis for denying public employment is analogous to the approach expressly disfavored by this Court in *Anderson* and *Saucier*. There is little doubt that this Court's precedent clearly establishes the general proposition that parents have the right to direct their child's education. The general proposition that public employees cannot generally be discharged for the exercise of their constitutional rights is likewise clearly established. However, the right at issue in this case is not clearly established in a more particularized, and hence more relevant, sense. In order to deny qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The Sixth Circuit's reasoning stops short of this final step, explaining only that the right exists and that exercising rights such as the one at issue cannot be the sole basis for denying public employment. As such, the Sixth Circuit failed to demonstrate that its legal conclusion, that public employees may not be terminated for privately educating their children, is clearly established in and of itself.

In finding that a right in question is not clearly established, this Court has previously been persuaded by the fact that "the constitutional question presented by [the] case is by no means open and shut." *Wilson*, *supra.*, 526 U.S. 615. In *Wilson* this Court examined the reasonableness of police officer conduct in executing a search warrant. *Id.* The Court looked at, *inter alia*, whether it was obvious from the general principles of the Fourth Amendment that the conduct of the officers in *Wilson* violated the Amendment. *Id.* at 615-16. The *Wilson* Court further noted that, at the time of the alleged violation, there were no judicial opinions holding the practice in question to be unlawful. *Id.* at 616. The *Wilson* Court concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money

damages for picking the losing side of the controversy." *Id.* at 618. The same analysis applies in the case at bar.

A review of the specific factors this Court found salient in *Wilson* reveals that the right in question in the case at bar is not clearly established. First, the constitutional question presented by this case is by no means open and shut, and there are but a few cases that address the issue. It appears that the only precedent on point seems to be a line of recent cases out of the Fifth Circuit, and one case out of the Eleventh Circuit. *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984). However, as discussed relative to question one, *infra.*, the above cases establish only a qualified right of public school employees to educate their children in private school.

Given the qualified right established by the only cases that appear to be on point, the present case is analogous to *Wilson*. The Constitutional question is not open and shut. There is limited precedent on point, none of which originates in the jurisdiction in which Petitioner engaged in the alleged conduct. Perhaps more importantly, the balancing test applied in the context of these cases, as recognized by the Fifth and Eleventh Circuits, indicates that each case is different. Whether the conduct in question materially and substantially impedes the operation or effectiveness of the educational program requires a balancing of constitutional jurisprudence with social policy. If judges could disagree on a constitutional question, it is unfair and unreasonable to subject Petitioner Lucci to money damages for picking the losing side of the controversy. *Wilson*, 526 U.S. at 618. The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or

those who knowingly violate the law." *Hunter*, 520 U.S. at 229.

Given the "balancing test" precedent, a reasonable public official would not be on notice that, in all instances, participation in constitutionally protected activity cannot be the sole basis for denying public employment. There is, no doubt, a broadly recognized right to rear one's child, but the contours of the right are not sufficiently defined to put a reasonable public official on notice that actions such as Petitioner Lucci's are constitutionally prohibited. The Sixth Circuit's analysis in determining that the right is sufficiently defined directly conflicts with the approach required by *Anderson* and its progeny. The contours of the right simply are not sufficiently clear such that a reasonable official would understand that what he is doing violates that right. As such, Respondent Lucci should be afforded qualified immunity.

Question Three. For the purposes of a qualified immunity inquiry in the context of an action brought under 42 U.S.C. § 1983, does a Plaintiff allege a violation of a constitutionally or statutorily protected right where that right is not asserted in the Complaint and where Plaintiff only makes passing reference to the right in a reply brief filed in opposition to a motion for summary judgment?

Deciding the constitutional question before addressing the qualified immunity question promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. *Wilson*, *supra*, at 609. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S.

226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991). Decision of this purely legal question permits the courts to expeditiously weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend a suit on the merits. *Id.* The "desirability of this approach" is apparent where the plaintiff fails "to establish the violation of any constitutional right at all." 500 U.S. at 233.

The case at bar presents just such a scenario. The District Court held, in its Opinion and Order granting in part and denying in part Petitioners' Motion for Summary Judgment, that Respondent had sufficiently alleged the constitutional right to direct the education of his child. *See*, Appendix C, 39a-41a. On appeal to the Sixth Circuit, Petitioners maintained that Respondent never pled any claim for a violation of his constitutional right to direct the education of his child. Rather, in its decision on summary judgment, the District Court developed the claim for Respondent, having dismissed all of Respondent's other pending federal claims. In light of the contention that Respondent never pled a claim for violation of his constitutional right to direct the education of his child, Petitioners maintained that he had not made the proper showing under the first prong of the immunity inquiry.

The Sixth Circuit disagreed, finding that Respondent's Complaint adequately pled a claim that Lucci violated Respondent's constitutional right to rear Respondent's child. *See* Appendix A, 9a-11a. The Court pointed to the subject heading in Respondent's first claim for relief, alleging a violation of 42 U.S.C. § 1983. *Id.* The Court recounted the factual allegations that (1) Respondent was informed of the school board's desire to have teachers' children enrolled in public school; (2) Respondent was told he would not be hired

because his son attended Catholic school; (3) Respondent was promised a full time contract once he enrolled his son in public school; and (4) Respondent was terminated when he re-enrolled his son in private school. *Id.* The Court then pointed to Respondent's claim for relief under the First Amendment, as well as "equal protection under the Fifth and Fourteenth" Amendments. *Id.*

The Court concluded that these allegations are sufficient to spell out a claim for constitutional violation of Respondent's right to direct his child's education, even though these words appear nowhere in the Complaint, despite two amendments thereto. *Id.* Indeed, the allegations spelled out in the Complaint could give rise to an unspecified myriad of constitutional claims. The Sixth Circuit does not deny, however, that Respondent never expressly alleges such a claim in his Complaint.

This Court has long held that a Plaintiff is the master of his complaint. *Webster v. Reproductive Health Services*, 492 U.S. 490, 512, 106 L. Ed. 2d 410, 109 S. Ct.3040 (1989). The Sixth Circuit itself has held that a pleading must contain something more by way of a claim for relief than a statement of facts that merely creates a suspicion that the pleader might have a right of action. *Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003); citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1216, at 163 (2d ed. 1990). The Sixth Circuit distinguished *Spadafore* from the instant case by noting that the Respondents in *Spadafore* failed to invoke § 1983 and "clarified any possible confusion in his response to Petitioners' Motion for Summary Judgment." 388 F.3d at 971.

In attempting to distinguish *Spadafore*, the Sixth Circuit overlooked the *Spadafore* Court's holding that it was

"reluctant to infer from the alleged facts a Fourth Amendment violation, *even one that seems obvious* based upon the allegations in this case, where none was pled by the [Respondents] or *addressed* in their opposition to the Petitioners' motion for summary judgment."
330 F.3d at 853. (Emphasis added).

Other Circuit Courts of Appeal have similarly refused to search for causes of action in a plaintiff's complaint. In *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003), the Court acknowledged that, while a Court ought to construe a plaintiff's complaint liberally, it may not rewrite a plaintiff's allegations. 337 F.3d at 309. (Citation omitted). Courts have held that *pro se* plaintiffs, who are consistently recognized as entitled to a liberal construction of their pleadings, will not have their pleadings rewritten by a Court to encompass claims that were never presented. *Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998).[3] As noted above, this Court has held that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. Decision of this purely legal question permits the courts to expeditiously weed out suits which fail the test. *Id.* The "desirability of this approach" is apparent where the plaintiff fails "to establish the violation of any constitutional right at all." 500 U.S. at 233. The Sixth Circuit failed to apply the above tests and to weed out Respondent's Complaint as one that fails to allege the violation of his constitutional right to direct the education of his child.

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[3] Respondent is not a *pro se* Plaintiff.

In light of the above, it is apparent that the Sixth Circuit's decision below conflicts with its prior decision in *Spadafore* and further conflicts with the Third Circuit's opinion in *Gen. Refractories*, and the Tenth Circuit's opinion in *Parker*. More importantly, the Court's decision below conflicts with *Siegert*, which requires Court's to properly determine whether a plaintiff fails to establish the violation of any constitutional right at all. The Sixth Circuit inferred from the facts alleged in the Complaint a claim not explicitly pled. The claim was not mentioned until Respondent filed his memorandum in opposition to Petitioner's Motion for summary judgment. The most clear reference to parental rights appeared in a heading to one of Respondent's arguments, but the claim is not all addressed in substance. Even though the Sixth Circuit may have found the parental rights claim to be obvious upon review of the Complaint, the Sixth Circuit ought not have inferred the claim.

The fact of the matter is that neither party contemplated this parental rights claim at the summary judgment stage. The parental rights claim did not emerge until the District Court "discovered" it in rendering its decision on summary judgment, after discovery was completed. Even if it is assumed *arguendo* that the facts as alleged in the Complaint make a parental rights claim obvious, the Court ought not find that the claim has been pled on this basis alone. The Respondent remains the "master of his complaint." *Webster*, 492 U.S. at 512. As such, the burden remains on the Respondent to articulate with some certainty whether he is or is not alleging a certain cause of action against a Petitioner, rather than allege a whole host of facts and then later "address" or clarify precisely what cause of action is to be inferred from his Complaint.

This is especially true after months of discovery, numerous depositions, discovery closure and the filing of a motion for summary judgment. Such a practice would allow Respondents to add unpled causes of action after reading a Petitioner's motion for summary judgment, after the close of discovery. This practice is contrary to longstanding concepts of jurisprudence. A Petitioner could never accurately guess a Respondent's causes of action, and then draft a summary judgment motion to cover all possible causes of action, even though not pled.

CONCLUSION

This proceeding involves questions of exceptional importance. There are countless public school districts around the country, and countless administrators that make hiring decisions on a regular basis. It stands to reason that some administrators may make the same decision that Petitioner Lucci allegedly did, under the rationale that the image of the public schools may be tarnished when public school teachers and/or employees opt not to enroll their children in the public school district where they themselves teach. It is certainly a common practice, and is indeed expected, that public school administrators and teachers will tout their school districts to develop and increase enrollments. The Fifth and Eleventh Circuits are the only jurisdictions with established precedent on point. The Sixth Circuit has now weighed in on the issue, but on a conflicting legal basis, disregarding the accepted "balancing test." The remainder of the Circuits are apparently silent.

The question whether the constitutional right to direct the education of one's child has been clearly established in this school employment context, which requires a balancing of interests test, is therefore exceptionally important: it may have

a widespread impact on the educational system in this country, and has not yet been addressed by this Court. In light of this exceptional importance, and for all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-4373

[Filed January 18, 2005]

Patrick Barrett, Plaintiff-Appellee, v. Steubenville City Schools, Defendants-Appellants.	)

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4373

[Filed, November 15, 2004]

PATRICK BARRETT,
Plaintiff-Appellee,

v.

STEUBENVILLE CITY SCHOOLS, RICHARD LUCCI, in his individual capacity only, DANIEL SPAHN, in his official capacity only, RUTH ANN BRUZZESE, in her official capacity only, WILLIAM KERR, in his official capacity only, WILLIAM HENDRICKS, in his official capacity only, and RICHARD BEAL, in his official capacity only,
Defendants-Appellants.

OPINION

DAMON J. KEITH, Circuit Judge.

Defendants-Appellants Steubenville City Schools, Superintendent Richard Lucci, in his individual capacity only, and Board Members, Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks, and Richard Beal, in their official capacities only, appeal the district court's denial of qualified immunity in this action claiming a deprivation of plaintiff's First and Fourteenth Amendment rights in defendants' failure to offer plaintiff a permanent teaching position. For the reasons that follow, we AFFIRM the district court's decision.

I. BACKGROUND

aintiff-Appellee, Patrick Barrett ("Barrett"), received his Bachelor's degree in education in 1997 and was subsequently certified to teach elementary education. In November 1998, Wells Elementary School ("Wells"), a Steubenville City School, hired Barrett as a substitute teacher. Beginning in January 1999, Barrett substituted for an eight-week term, taking the place of a first grade teacher on maternity leave. The principal at Wells, John Holub ("Holub"), then offered Barrett a substitute teaching position for the remainder of the school year to take the place of a fourth grade teacher on maternity leave. Barrett accepted the position with the hope of receiving a full-time teaching contract for the following school year.

In May 1999, Barrett was scheduled to be interviewed for a full-time teaching position with Steubenville City Schools. Prior to the interview, Holub advised Barrett that Richard Lucci ("Lucci"), who would be assuming the position of Superintendent during the next school year, would not give Barrett a teaching contract unless his son attended Steubenville City Schools. From the time that he was in kindergarten, Barrett's son had attended All Saints, a Catholic

school. After Barrett's conversation with Holub, Barrett was interviewed by Steubenville City Schools administrators, including Lucci, then-Assistant Superintendent. Lucci asked Barrett where his son would be attending school the following year, and Barrett told him that his son would finish the eighth grade next year at All Saints. After the interview, Barrett had another conversation with Holub, who again indicated that Lucci would not give Barrett a teaching contract until he moved his son out of All Saints and into Steubenville City Schools.

During the summer of 1999, two teaching positions became available. Barrett did not receive an offer for either position. In fact, a teacher who had not substituted with Steubenville City Schools was hired, despite a tradition within the school district to hire teachers who had previously substituted.

In August 1999, Barrett again interviewed with now Superintendent Lucci and informed him that his former job had recalled him back to work and he needed to make a decision. Barrett asked Lucci for a full-time teaching contract with Steubenville City Schools. Barrett claims that Lucci told him, "I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." Barrett claims that he relied on this promise in declining to return to his full-time position with his former employer and instead served for another year as a substitute teacher.

During the 1999-2000 school year, Holub often expressed to Barrett Lucci's disapproval of Barrett's son attending private school. Barrett claims that in May 2000, Holub once again told Barrett that he would never receive a full-time teaching contract until he enrolled his son in Steubenville City

Schools. Also in May 2000, Lucci informed Barrett that he should consider moving his son to public school for at least one year, insisting that Barrett's son would like it. Barrett claims that he was under such pressure, especially after turning down full-time employment with his former employer, that during the summer he enrolled his son in Steubenville High School for the 2000-01 school year. Even after he enrolled his son in Steubenville City Schools, Barrett was not offered teaching positions when they became available.

In August 2000, Barrett again went to speak with Lucci about his position. Lucci asked Barrett how his son felt about changing schools, and Barrett replied that his son was unhappy. Lucci informed Barrett that "it would be held against him" if his son did not attend Steubenville High School. Lucci also explained to Barrett that the school board liked for teachers to enroll their children in the public school system because it "looked good" to those parents whose children attended Steubeville City Schools. Lucci stated that if Barrett returned as a long-term substitute, then he would be given a full-time contract after his sixty-day period was complete.[1]

Barrett began the 2000-01 school year as a full-time substitute teacher with the expectation that he would receive a full-time teaching contract. Barrett, however, reconsidered his decision regarding his son's education, removed him from Steubenville High School, and enrolled him in Catholic Central High School. On September 29, 2000, Barrett met with Lucci and the Assistant Superintendent. Barrett claims

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[1] Steubenville City Schools had a policy or practice that granted full-time contracts to teachers who taught for at least sixty days in the same classroom. J.A. at 129.

that Lucci told him that he was being removed from his position as a fourth grade substitute teacher at Wells. When Barrett questioned Lucci about the reason for his removal, Lucci told him that he was being disloyal. Lucci also expressed that he thought public high school would be better for Barrett's son. Barrett then reminded Lucci of his agreement to grant him a full-time contract after Barrett completed his sixty days of teaching in the classroom. Lucci became irate, denied ever making such a promise, and ordered Barrett to clean out his classroom that day.

Consequently, in June 2001, Barrett filed suit in the district court against Defendants-Appellants Steubenville City Schools, Superintendent Lucci, in his individual capacity, and Board Members Spahn, Bruzzese, Kerr, Hendricks, and Beal, in their official capacities only. Barrett asserted several claims, including: civil rights violations under 42 U.S.C. § 1983, religious discrimination under Ohio law, breach of contract, promissory estoppel, and tortious interference with present contractual relations or prospective contractual relations or both. Defendants filed a motion for summary judgment. The district court granted Defendants' motion as to Barrett's federal and state claims of religious discrimination and as to Barrett's claim of equal protection and free exercise of religion under 42 U.S.C. § 1983. The district court denied, however, defendants' motion as to Barrett's parental rights claim under § 1983 and the remaining state law claims. Defendants timely filed this appeal.

The only issue before us on appeal is whether Lucci is entitled to qualified immunity. In answering that question, we must determine whether the district court erred in finding that there is a clearly established constitutional right for parents to direct the education of their children and that Lucci's actions

violated that right. For the reasons that follow, we find that the district court did not err in its conclusion.

II. DISCUSSION

A denial of summary judgment is ordinarily not a final judgment and therefore not reviewable on appeal. *Hoover v. Radabaugh*, 307 F.3d 460, 465 (6th Cir. 2002). The present case, however, involves a decision by the district court to deny qualified immunity to a public official accused of violating plaintiff's constitutional rights. "District court denials of qualified immunity may be appealed as collateral orders where (1) the defendant is a public official asserting the defense of qualified immunity, and (2) the issue appealed concerns not which facts the parties might be able to prove, but whether certain alleged facts reflect a violation of clearly established law." *Id.* (citations omitted). Because Defendants are not challenging the facts but rather claim that they did not violate the law, the jurisdictional requirements are met in the present case.

Whether qualified immunity applies to an official's actions is a question of law that this court reviews *de novo*. *Virgili v. Gilbert*, 272 F.3d 391, 392 (6th Cir. 2001). Qualified immunity is an affirmative defense that shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Once the defense is raised, the plaintiff bears the burden of showing that the defendant's conduct violated a right so clearly established that a reasonable official in that position would have clearly understood that he or she was under an affirmative duty to refrain from such conduct. *Rich*

v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir. 1992). The plaintiff, thus, bears the ultimate burden of proof to show that the defendant is not entitled to qualified immunity. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991). On appeal, in viewing the facts in favor of the plaintiff, we must decide first whether a constitutional violation occurred and second whether that right was clearly established. *Hoover*, 307 F.3d at 465.

A. Violation of Constitutional Right

"To state a cause of action under § 1983, a plaintiff must allege the deprivation of a right secured by the United States Constitution or a federal statute by a person who was acting under color of state law." *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). In this case, Barrett has filed a complaint where the first claim for relief is entitled "Violation of Civil Rights, 42 U.S.C. § 1983." Second Amended Complaint P 10. In his complaint, under this particular claim, Barrett alleged that he was told by Defendant Lucci "that the school board wanted the children of its teachers enrolled in Steubenville City schools." *Id.* Barrett alleged that Holub told him that "Lucci was impressed with Plaintiff Patrick Barrett's qualifications but that he would not be hired for a full-time position because Plaintiff's son attended a Catholic school." *Id.* P 8. Barrett also alleged that he was denied full-time teaching positions while his son was enrolled in private school, but once he enrolled his son in Steubenville City Schools, Lucci promised him a full-time contract. *Id.* P 12. Finally, Barrett alleged that, after Barrett removed his son from public school and re-enrolled him in private school, Lucci terminated Barrett for being disloyal. *Id.* P 13. After citing the factual allegations, Barrett then indicated that the Defendants deprived him of not only his First Amendment right to freedom of religion, but also of "equal protection

under the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* P 14.

Appellants argue that these allegations and legal assertions are insufficient to show a violation of Barrett's constitutional right to direct the education of his child. To support their argument, Appellants cite our recent decision in *Spadafore v. Gardner*. In *Spadafore*, we reviewed a dismissal of § 1983 claims against defendants in their individual capacity. 330 F.3d at 852. We found that the plaintiffs' claims of § 1983 violations "were not adequately set forth in their complaint." *Id.* at 853. In so finding, we noted that "nowhere in the complaint was § 1983 specifically invoked against the individual defendants." *Id.* at 852. We also indicated that "from the language of the complaint, one cannot ascertain which substantive constitutional rights were allegedly violated. Nor was this clarified in the [plaintiffs'] response to the defendants' motion for summary judgment." *Id.* at 853.

Here, the facts are clearly distinguishable. First, Barrett provided a detailed description of the alleged violations. He asserted that Lucci not only conditioned his full-time employment on where his son attended school, but also terminated him once his son was removed from public school. Barrett specifically pleaded these allegations under the claim for § 1983 violations. Additionally, unlike the plaintiff in *Spadafore,* Barrett clarified any possible confusion in his response to Defendants' motion for summary judgment.[2] We,

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[2] In Plaintiff's Memorandum Contra Defendants' Motion for Summary Judgment, the first argument heading is entitled " Material Issues of Fact Exist as to Plaintiffs' § 1983 Claim of Infringement of His Fundamental Right in the Rearing of His Child as Protected by the Equal Protection Clause and the First Amendment Free Exercise Clause." J.A. at 135.

therefore, find that the facts as alleged by Barrett set forth a claim that Lucci violated his constitutional right to rear his child.

B. Constitutional Right Clearly Established

Once we have found a violation of a constitutional right under the plaintiff's facts, we must then determine if that right was clearly established. *Hoover*, 307 F.3d at 465. We look to whether a reasonable official would understand that his actions violated that right. *Id.* at 468.

This court has emphasized that "to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." *Ohio Civil Serv. Employees Ass'n v. Seiter,* 858 F.2d 1171, 1177 (6th Cir. 1988). In an extraordinary case, decisions of other circuits may be used to clearly establish a principle of law if they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Id.* A few admittedly novel opinions from other circuit or district courts are not enough to form the basis for a clearly established constitutional right in the Sixth Circuit. *Id.*

Here, the district court correctly determined that the right to direct the education of one's child was clearly established. Both the Supreme Court and this court have repeatedly recognized that parents have a fundamental right to raise their children, including directing their children's education. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390, 400, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (recognizing the right of "the

parent to give his children education suitable to their station in life"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (striking down state law that required parents to send their children to a public school for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (2002) (Thomas, J., concurring) (emphasizing that "this Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (recognizing that because parents have a constitutional right "to direct their children's education," organization has standing to bring claim on behalf of parents); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002) (stressing that "both Supreme Court precedent and our national tradition suggest that a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution"). More specifically, the Supreme Court has also indicated that "parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction . . . ." *Runyon v. McCrary*, 427 U.S. 160, 178, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976). Thus, it is clearly established that parents have a fundamental right to direct the education of their children.

That Barrett has the fundamental right to educate and raise his children, in and of itself, does not provide Lucci with clearly established law that his actions violated this right.

There is, however, precedent from both the Supreme Court and the Sixth Circuit that makes clear that Lucci's actions violated Barrett's fundamental parental right. In *Perry v. Sinderman*, the Supreme Court found unconstitutional the nonrenewal of a teaching contract on the basis of a teacher's exercise of a constitutionally protected interest. 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). We have decided several cases applying the principle of law set forth in *Perry*. In *Littlejohn v. Rose*, we found that the refusal to rehire a non-tenured teacher violated the constitutionally protected right of privacy if such denial was based on the teacher's divorce. 768 F.2d 765, 769-70 (6th Cir. 1985) ("It is clear from the Supreme Court's analysis in *Perry* that a person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty constitutes an impermissible reason for denying employment."). In *Adkins v. Board of Education of Magoffin County, Kentucky*, plaintiff was denied employment with a school board simply because of her marriage to a person who her employer disliked. 982 F.2d 952 (1993). In finding that the district court erred in granting defendants' motion to dismiss, we specifically stated that "while the plaintiff had no contractual right to a job, she could not be deprived of her public employment for exercising a constitutional right." *Id.* at 955. Similarly, in *Montgomery v. Carr*, we found that "if the only motivation for a public official in taking some adverse employment action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." 101 F.3d 1117, 1127 (1996). Therefore, based on precedent specific to this court, the government cannot deny someone

employment simply because that person is exercising his fundamentally protected right.[3]

In this case, Barrett made a decision to send his son to private school. Barrett's choice in directing his son's education is activity shielded by his constitutionally protected right of liberty. The Defendants do not dispute that. Because it has been clearly established that one's involvement in constitutionally protected activity cannot be the sole basis for denying public employment, any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law.

Nevertheless, Defendants argue that "there is no clearly established line of cases out of the Supreme Court or this Circuit which establish that dictating where public school employees send their children to school violates the employees' parental rights." Appellants' Br. 13. Defendants

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[3] The dissent argues that a "public employer can insist that employees waive certain rights," *dissent* at 8, and summarizes the ultimate holding of this court in *Montgomery* to support its assertion, *Id.* (noting that "this court upheld a school district's anti-nepotism policy, which required the transfer of one employee because that employee was married to another employee, despite the right to marry"). While our ultimate holding in *Montgomery* found that there were legitimate reasons for a school's anti-nepotism policy, the dissent overlooks the court's language marking as unconstitutional a public employer's adverse employment action based only on a protected right. Here, we have just that. Unlike the case in *Montgomery,* we are not deciding this case on the merits; in viewing the facts in favor of Barrett, he was denied employment *only* because he was exercising his right to educate his son in a manner of his choice.

would have us find that the district court erred by relying on other circuits in its analysis.[4] The cases referenced by the district court point unmistakably to the unconstitutionality of the conduct complained of and are clearly foreshadowed by applicable direct authority in the Supreme Court. *See, e.g., Pierce*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571; Perry, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694. While it was therefore permissible for the district court to rely on these cases in finding that the law was clearly established, it was unnecessary. We do not adopt the district court's analysis,[5] for we need not rely on law outside of our jurisdiction to find that a clearly established right exists.

The Supreme Court has instructed that qualified immunity does not require "the *very action in question* [to] have previously been held unlawful," but rather *"in the light of pre-existing law* the unlawfulness must be apparent."

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[4] In its opinion, the district court cited precedent from the Fifth and Eleventh Circuits to support the proposition that dictating where an employee of the school district can send his child to school infringes on the familial rights of that teacher. *See Fyfe v. Curlee*, 902 F.2d 401, 403 (5th Cir. 1990) (holding that retaliation against a school employee who placed her child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court"); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984) (holding that a school board policy prohibiting employees from sending their children to private schools interfered with employees' constitutional right to control the education of their children).

[5] "We may affirm a decision of the district court if correct for any reason, including one not considered below." *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 330 F.3d 747, 750 (6th Cir. 2003).

Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) (emphasis added). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to his child to a private school. [6] As aforementioned, Barrett has a constitutionally protected fundamental right to educate his child at the school of his choice. There is also a clearly established law that forbids employers from denying one employment based only on "person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty." *Adkins*, 982 F.2d at 955 (citing *Littlejohn*, 768 F.2d at 769-70). In accordance with these fundamental principles of law, Lucci cannot obtain qualified immunity by claiming that no clearly established right existed.

III. CONCLUSION

In sum, we reiterate that parents have a constitutionally protected liberty interest in raising and directing the education

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[6] This court has, in fact, addressed this issue. *See Janes v. Bardstown City Sch. Bd. of Educ.*, 97 F.3d 1452, 1996 WL 536794 [published in full-text format at 1996 U.S. App. LEXIS 24997] (6th Cir. 1996), In *Janes*, a teacher sued the public school system alleging that she was not considered for a teaching position because her children attended parochial schools. We held that summary judgment was not warranted when there are facts in dispute as to whether "defendants violated Mrs. Janes' federal constitutional right to direct the education of her children." 1996 U.S. App. LEXIS 24997, [WL] at **1.

of their children. A state employer cannot condition employment upon the waiver of that right. For these reasons, we AFFIRM the judgment of the district court in denying Lucci qualified immunity.

DISSENT

ROGERS, Circuit Judge, dissenting.

Qualified immunity protects the private funds of an official sued in his individual capacity for actions that have not been clearly established to be unconstitutional, even if the actions are later determined indeed to have been unconstitutional. Even assuming that the termination of a public school teacher for not sending his children to the public schools is unconstitutional,[7] it is not clearly established to be unconstitutional. This is because the legal conclusion results from a balance that has not been definitively made by the Supreme Court, the Sixth Circuit, or even by federal courts in general.

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[7] Although, for purposes of this dissent, I assume that Barrett's termination was unconstitutional, this is not necessarily the case. If this court were to apply a test similar to that applied in *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996) a case addressing an anti-nepotism policy and the right to marry, this court could conclude that only rational basis scrutiny was warranted for Barrett's claim, *See id.* at 1124-29. And under a rational basis analysis, the government's interest in eliminating the inference that public schools are of lesser quality that private schools, an inference that can be drawn when a public school teacher sends his child to private school, may be sufficient to justify the requirement imposed on Barrett.

The majority concludes that "any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law." And yet, such a right has not been articulated in the Supreme Court or this circuit. Rather, the majority constructs this right from the parts of two others: the fundamental right of a parent to raise his or her children and direct their education, which is clearly established, and a right the majority describes as a right not to be denied government employment because of a decision to exercise a fundamentally protected right. This second "right" is not a right in all contexts, and has certainly not been clearly established in the context presented by this case.

Public employees can be required to give up some of their constitutional rights, although certainly not all of them. The public employer can insist that employees waive certain rights, but cannot insist that employees waive others. It is concededly clearly established that public employers cannot require their employees to vote a certain way, to go to religious services, or to do a number of other things that are unrelated to the public employment. This explains the cases relied upon by the majority, such as *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (public criticism of college's board of regents), *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985) (divorce), and *Adkins v. Board of Education,* 982 F.2d 952 (6th Cir. 1993) (marriage to a particular person). On the other hand, public employers can require employees to give up some constitutional rights, such as the right to read the newspaper all day, or the right to proselytize all day, where the restriction is sufficiently related to the purpose of the employment. For instance, in *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), a case relied upon by the majority opinion, this court upheld a school district's anti-nepotism policy, which required the transfer of

one employee because that employee was married to another employee, despite the right to marry. And in *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935 (6th Cir. 2004), this court upheld a school board's decision to deny tenure to a teacher who had a relationship with a student, despite the right to intimate association.

Telling a teacher where his child may go to school may fall somewhere in between. Just the two clearly established propositions, (1) that parents have a right to send their children to nonpublic schools and (2) that public employers cannot make employees give up all their constitutional rights, do not, even together, clearly establish the conclusion (3) that public school employers cannot require teachers to put their own children in the public schools. Conclusion (3) may result from a careful examining and balancing of the interests in (1) with the need of schools to have teachers demonstrate commitment to the public schools, but it cannot be said that such a conclusion is clearly established.

Under the proper test, in order for a right to be considered clearly established, it must be "'so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.'" *Akers v. McGinnis*, 352 F.3d 1030, 1042 (6th Cir. 2003) (quoting *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987)). Or, as this court has said elsewhere, "'for qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.'" *Saylor v. Bd. of Educ.*, 118 F.3d 507, 515 (6th Cir. 1997) (emphasis in original) (quoting *Lassiter v. Alabama A & M Univ., Bd. of*

Trustees, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)). On the facts of this case, it is not clear that "every like-situated, reasonable government agent" would have clearly understood that the right to direct the education of one's children should be combined with a balancing test used to determine what rights a public employer can require a public employee to give up, with the result that a public school can not require a public school teacher to send his or her child to that public school. Accordingly, Superintendent Lucci should be accorded qualified immunity in this case.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-01-470

[Filed, September 11, 2003]

Patrick Barrett, Plaintiff,	)
v.	)
Steubenville City Schools, et al., Defendants.	)

OPINION AND ORDER

SMITH, District Court Judge, KEMP, Magistrate

Plaintiff, Patrick Barrett, asserts that defendants deprived him of his First Amendment Right to Freedom of Religion and Equal Protection, in violation of 42 U.S.C. § 1983 and O.R.C. § 4112.99, when they decided not to offer him a permanent teaching position with the Steubenville City Schools. Plaintiff additionally asserts that he was subjected to religious discrimination in violation of Title VII, 42 U.S.C. § 2000 et seq. Plaintiff also asserts state law claims of breach

of contract, promissory estoppel and tortious interference with present and/or prospective contractual relations. This matter is before the Court on defendant's motion for summary judgment. Based on the following, defendants' motion for summary judgment is granted in part and denied in part.

I. FACTS

Plaintiff, Patrick Barrett, received his Bachelor's degree in education in 1997 and his Masters in elementary education in 2001. Plaintiff then obtained his teaching certificate in elementary education. In November 1998, plaintiff was hired as a substitute teacher at Steubenville City Schools. Prior to joining Steubenville Schools, plaintiff was a pipefitter and welder at Weirton Steel, but was laid off.

In January 1999, plaintiff was hired to be a long term substitute teacher at Wells Elementary School, a Steubenville School. He filled in at the first grade level for a teacher who was on maternity leave for eight weeks. The principal at Wells, John Holub, asked plaintiff if he would remain on for the entire school year, filling in for a fourth grade teacher who had taken a year off for maternity leave. Plaintiff accepted the position with the hopes of receiving a full-time teaching contract for the following school year.

In May 1999, plaintiff interviewed for a full-time teaching position with Steubenville Schools. Prior to the interview, Holub advised plaintiff that Richard Lucci, who would be taking over as Superintendent, would ask him about his son and where he attended school. Plaintiff's son, Tyler Barrett, was in the eighth grade at All Saints, a Catholic school, where he has attended school since kindergarten. Holub then told plaintiff that Lucci would not give him a contract unless his son attended Steubenville City Schools.

Plaintiff was interviewed by three administrators, Superintendent, Dr. Joyce, Anne Stevenson, and Assistant Superintendent, Richard Lucci. Plaintiff was asked about his education and experience by Joyce and Stevenson. Plaintiff claims Lucci then asked him where his son would be attending school next year and he replied, All Saints. Subsequent to the interview, plaintiff claims he again had a discussion with Holub who indicated that Lucci would not give plaintiff a teaching contract until he moved his son out of Catholic school into the Steubenville schools.

During the summer of 1999, two teaching positions became available, however plaintiff claims he did not receive consideration for either position. Plaintiff claims that Lucci hired a teacher for the second grade position who had never substituted before despite a tradition within the school district to hire teachers who had previously substituted.

In August 1999, plaintiff again interviewed with now Superintendent Lucci and informed him that Weirton Steel had recalled him back to work and he needed to make a decision. Plaintiff asked Lucci for a full-time teaching contract with Steubenville Schools. Plaintiff claims that Lucci told him "You have a future here. I could not promise you a job because I may not be here next year, and I can't promise a job if someone new is in the position, but if I am, you have a future here because you do such a good job." (Barrett Aff. ¶ 14). Plaintiff claims he relied on this promise in declining to return to the full-time position at Weirton Steel and instead put in another year as a substitute teacher.

Plaintiff claims that during the 1999-2000 school year, he was often told by Principal Holub that Lucci did not like where his son was attending school. Plaintiff claims that in May 2000, Holub again told plaintiff that he would never

receive a full-time teaching contract until he moved his son to Steubenville City Schools.

Also in May 2000, plaintiff claims Superintendent Lucci told him that he should consider moving his son to the public schools for at least one year, insisting that plaintiff's son would like it. Plaintiff claims that he was under such pressure, especially after turning down full-time employment with Weirton Steel, that he enrolled his son in Steubenville High School. Even after moving his son, when teaching positions became available, they were not offered to plaintiff.

In August 2000, plaintiff again went to speak to Superintendent Lucci about his position. Lucci asked plaintiff how his son felt about changing schools and plaintiff replied that his son was not happy. Lucci then said that he would get used to it. Plaintiff then asked if his son did not attend Steubenville High School, would it be held against him, and Lucci replied yes. Lucci explained that the School Board liked for teachers to have their kids in the public school system because it looked good to other parents. Lucci then told plaintiff that if no other positions were open, if plaintiff returned as a long-term substitute, than this time he would let plaintiff get his sixty days in so he could receive a full time teaching contract.[8] Plaintiff claims that he was expressly told that he would have a contract after his 60th day.

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[8] The Steubenville City School District's collective bargaining agreement provides that teachers who have taught for sixty consecutive days in the same classroom will receive full-time teaching contracts. However, on occasion, a teacher would be removed on the 59th day to avoid granting a full-time contract. Plaintiff claims that near the end of the previous school year, Lucci removed him from the classroom for three days so he could not get his sixty days in.

Plaintiff began the following school year as a full-time substitute teacher with the expectation that he would receive a full-time position. Plaintiff, however, reconsidered his decision to enroll his son in Steubenville High and re-enrolled him in Catholic Central High School. The new principal at Wells, Melinda Young, approached plaintiff about his son and stated that Lucci would give him his contract if he sent his son to Steubenville. Other teachers at Wells also approached plaintiff encouraging him to reconsider his decision to switch his son or else he would not receive a contract. On September 29, 2000, plaintiff was told to report to Superintendent Lucci's office, where he met with Lucci and Assistant Superintendent Richard Renallo. Plaintiff claims that Lucci told him in an angry voice that he was being removed from his position as a fourth grade substitute teacher at Wells. When plaintiff inquired as to the reason why, he was told he was being disloyal. Plaintiff also reminded Lucci of his agreement to grant him a full-time contract after plaintiff achieved his 60 days of teaching in the classroom. Lucci then became irate and shouted that he did not promise plaintiff a contact after sixty days. Plaintiff was ordered to clean out his classroom that day.

Subsequent to plaintiff's dismissal, several of the parents of children he had been teaching sent around a petition protesting the School Board's unfair refusal to hire plaintiff as a full-time teacher. Plaintiff also points out that he received favorable reference letters from Holub.

In June 2001, plaintiff filed this suit against defendants Steubenville City Schools, Superintendent Lucci, in both his individual and official capacities, and Board Members, Spahn, Bruzzese, Kerr, Hendricks and Beal, in their official capacities only. Plaintiff alleges that defendants deprived him of his First Amendment right to freedom of religion, that he

was subjected to religious discrimination, breach of contract, promissory estoppel and interference with present and/or prospective contractual relations.

II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56 ©, which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson*

Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000).[9] The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

The Sixth Circuit Court of Appeals has recognized that *Liberty_ Lobby, Celotex,* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id* at 1479.

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[9] *Reeves* involved a motion for judgment as a matter of law made during the course of a trial under Fed. R. Civ. P. 50 rather than a pretrial summary judgment under Fed. R. Civ. P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves,* 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). As such, *Reeves* did not announce a new standard of review for summary judgment motions.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id* (quoting *Liberty Lobby,* 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id* (quoting *Matsushita,* 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id* at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001).

III. DISCUSSION

Plaintiff asserts that he was deprived of his First Amendment right to freedom of religion and subjected to religious discrimination when defendants refused to offer him a full-time teaching position in the district. Plaintiff also asserts claims of breach of contract, promissory estoppel and tortious interference with present and/or prospective contractual relations. Defendants argue that plaintiff has failed to set forth a prima facie case of religious discrimination and that plaintiff has not established that defendants violated his right to free exercise of his religious beliefs. Additionally, defendants argue that Superintendent Lucci is immune from liability.

A. Motion to Strike

As a preliminary matter, defendants have moved to strike portions of plaintiff's memorandum contra to defendants' motion for summary judgment citing plaintiff's affidavit arguing plaintiff offers hearsay in support of his arguments. Defendants also move to strike portions of plaintiff's affidavit asserting that portions contain hearsay and contradict his deposition testimony. Defendants further move to exclude the affidavit of Father Calovini arguing they would be unfairly prejudiced by its admission.

Federal Rule of Civil Procedure 56(e) sets forth three mandatory requirements for affidavits that are used in support of, or in opposition to, a motion for summary judgment. The rule requires that such affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e). "An affidavit that does not satisfy the requirements of Rule 56(e) is subject to a motion to strike." *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F.Supp. 2d 948, 954 (S.D.Ohio 2000) (quoting *Collazos Cruz v. United States*, No. 96-5452, 1997 U.S.App. LEXIS 17196, 1997 WL 377037, at 2 (6th Cir. July 3, 1997)).

Defendants assert that plaintiff's affidavit contains inadmissible hearsay and thus should be stricken from the record. "Hearsay evidence cannot be considered on a motion for summary judgment." *Wiley v. U.S.*, 20 F.3d 222, 226 (6th Cir. 1994). Defendants argue that the statements made by principals, John Holub and Melinda Young, and teachers, Elizabeth Shenefield and Nancy Schuster, are being offered to prove the truth of the matter asserted, which is that Superintendent Lucci required plaintiff to transfer his son to

Steubenville City Schools in order to receive a full-time teaching position. Plaintiff argues that the statements were admissions by party-opponents, statements against interest or in the alternative, not hearsay.

The Court finds that the statements made by Principal Holub and Principal Young are not hearsay, but rather are admissions by a party-opponent. Fed. R. Evid. 801(d)(2)(D). Rule 801 (d)(2)(D) provides: "A statement is not hearsay if--the statement is offered against a party and is (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." A principal of a school serves as the supervisor of the teachers, carrying out the policies set by the administration. Therefore, Principals Holub and Young were acting within the scope of their employment as agents of the administration when discussing with plaintiff the issue of where plaintiff's son attends school and herefore will be admitted.

The teachers, on the other hand, were not plaintiff's supervisors and were not speaking as agents of the administration when discussing plaintiff's son. The statements by the teachers do not qualify as statements against interest, nor are they being offered for the truth of the matter asserted. Therefore, the statements made by the teachers, Elizabeth Shenefield and Nancy Schuster, constitute hearsay and will be stricken from plaintiff's affidavit. Additionally, plaintiff' s arguments in reliance on any statements made by these teachers will not be considered by the Court.

Next, defendants argue that certain portions of plaintiff's affidavit should be stricken because they contradict plaintiff's deposition testimony. Generally, a party may not file an affidavit that contradicts earlier deposition testimony in an

attempt to create a factual issue. *Reid v. Sear, Roebuck and Co.*, 790 F.2d 453 (6th Cir. 1986). The first statement of plaintiff's affidavit that defendants argue contradicts plaintiffs earlier deposition is "I was told by Richard Lucci, Superintendent of the Steubenville City Schools, that I would not receive a contract to teach full time in the Steubenville City Public Schools if my son was enrolled in All Saints/Catholic Central."(Pls' Aff. ¶ 7). Next, defendant s dispute statements in plaintiffs affidavit regarding what Mrs. Schuster, a fellow teacher, said to plaintiff. Defendants additionally challenge plaintiffs argument that he decided not to return to Weirton Steel as a result of Superintendent Lucci's promise. Finally, with regard to damages, plaintiff states in his affidavit that he now has to pay for benefits and he would not if he were employed at Weirton Steel. However, defendants argue that plaintiff admitted in his deposition that he had health insurance through his wife's employer.

The Court has already stricken any statements by plaintiff regarding what was said to him by fellow teachers, including Mrs. Schuster. With regards to the first and third statements defendants argue are contradictory to plaintiffs deposition, the Court does not find evidence of a direct contradiction. It appears that plaintiff's affidavit contains more clear and elaborate statements, rather than contradictions to his deposition[10] Finally, the statement regarding damages appears to be contradictory but defendants have failed to provide the

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[10] Defendants have only provided the exact part of the deposition to which they are referring to as being contradictory to plaintiff's affidavit which it makes it difficult to determine the context of the statements. However, the Court believes that plaintiff's affidavit is consistent with his deposition testimony.

Court with plaintiffs deposition testimony pages 25-26, therefore plaintiffs affidavit is admissible regarding damages.

Finally, defendants argue that plaintiff should not be permitted to enter the affidavit of Reverend Monsignor Gerald Calovini. (Doc. 42). The Court has not relied on Calovini's affidavit, and therefore finds it unnecessary to strike it from the record. Motion denied. The Court now turns to plaintiff's claims.

B. Religious Discrimination

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(A)(1). Specifically, the statute provides that it is unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...religion[.]" *Id.* The term "religion" as used within Title VII includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e(j).

Defendants argue that plaintiff has failed to establish a prima facie case of religious discrimination. A plaintiff may establish a prima facie case of discrimination under Title VII through either direct evidence or circumstantial evidence. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078,

1081 (6th Cir. 1994). If the plaintiff presents direct evidence that the employer discriminated against him on the basis of a protected characteristic, the burden of persuasion shifts to the employer who then must show that it would have taken the same action even without the discriminatory motivation. *Id* Plaintiff argues that he has direct evidence of discrimination and therefore the *McDonnell Douglas* test is inapplicable. "Direct evidence" of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Jacklyn v. Schering Plough Healthcare Products Sales Corp., 176 F.3d 921,926 (6th Cir. 1999). When a plaintiff can cite direct evidence of discrimination, the *McDonnell Douglas* shifting burdens of proof are not applicable. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111,121 (1985). Upon crediting the plaintiff's direct evidence, the district court finds facts requiring the conclusion that unlawful discrimination was at least a "motivating factor" for the employer's actions. *Blalock v.Metals Trades, Inc.*, 775 F.2d 703, 707-10. The existence of unlawful discrimination is patent, and if the employer does not propose an alternative explanation for its actions, Title VII liability will automatically follow. *Id*

If the employer does assert an alternative justification for its employment action, the employer must do more than merely "articulate" its nondiscriminatory justification as required under *McDonnell Douglas* because discrimination has already been established by the plaintiffs direct evidence. See *Blalock,* 775 F.2d at 710. At this point, the case becomes a 'dual motive' or 'mixed motive' case and the crucial issue becomes one of causation. Id. In *Blalock,* the Sixth Circuit adopted the causation standard of *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274 (1977), under which the burden shifts to the employer to prove by a preponderance of the evidence "that the adverse employment

action would have been taken even in the absence of the impermissible motivation." *Blalock,* 775 F.2d at 712. Thus, once plaintiffs direct evidence is accepted, the employer's asserted nondiscriminatory reason for its action, which must merely be "articulated" under *McDonnell Douglas,* effectively becomes an affirmative defense on which the employer bears the burden of proof. *Id*

Plaintiff asserts that on numerous occasions Superintendent Lucci and Principals Holub and Young directly told him that he needed to disenroll his son from the Catholic school and enroll him in the Steubenville Public Schools in order to obtain a full-time teaching contract. Lucci explained to plaintiff that the School Board liked teachers to have their kids in the public school system because it looked good to other parents. Specifically, plaintiff asserts quid pro quo discrimination, that Superintended Lucci told plaintiff that if he enrolled his son in the Steubenville City Schools, he would allow him to get his sixty days in so that he could receive a full-time teaching contract. Plaintiff decided to enroll his son in Steubenville High School, but before the school year began in August 2000, plaintiff changed his mind and kept his son in Catholic school. Plaintiff was again hired as a long-term substitute for the 2000-2001 school year, but on September 29, 2000, plaintiff was instructed to see Superintendent Lucci and Assistant Superintended Renallo and he was told that he was being removed from his position as a fourth grade substitute teacher at Wells. When plaintiff inquired as to why, he was told he was being disloyal.

Defendants argue that plaintiff was not subjected to an adverse employment action, but was merely reassigned as a substitute at another school. Additionally, Superintended Lucci asserts in his affidavit that plaintiff was removed from his long term teaching position during September 2000 due to

his unsatisfactory performance. Lucci claims he received complaints of plaintiff's performance and general ineffectiveness in the classroom during the 2000-2001 school year. Defendants maintain that plaintiff has remained on their substitute teacher list and despite being called to substitute teach on numerous occasions, plaintiff has refused.

Defendants rely on the holding of an unpublished Sixth Circuit opinion, *Janes v.Bardstown City Schools Board of Education*, No. 95-5531, 1996 WL 536794 (6th Cir. 1996), in support of their argument that plaintiff has not asserted a claim for religious discrimination under Title VII. In *Janes*, the plaintiff claimed she was denied consideration for a teaching position in the public school system because she sent her children to parochial schools and not to the Bardstown public school. When Janes inquired as to why she was not even considered for the job, she was at first told she was overqualified and then she was ultimately told that she was not granted an interview because her children attend the parochial school system. The court granted summary judgment to defendants after concluding that Janes had not demonstrated that sending her children to parochial schools was engaging in the type of "observance or practice" entitled to protection under Title VII and the 6th Circuit Court of Appeals affirmed the trial court's judgment on this issue. *Id.* at *4.

In the case at bar, plaintiff asserts that he is Catholic and has raised his son in the Catholic faith. Plaintiff claims that he follows all the practices regarding religious education as stated in the Catechism of the Catholic Church and the Document on Christian Education Diocesan Synod of 1983, which are binding on his Diocese. (Plaintiff's Aff. ¶ 2-5). Plaintiff also asserts that his son is considering becoming a Catholic Priest. (Plaintiff's Aff. ¶ 4). Under *Janes*, however,

plaintiff has failed to prove that defendants discriminated against him because he is Catholic. Plaintiff has established that defendant Lucci wanted him to enroll his son in the Steubenville Public Schools. In fact, plaintiff even said that Superintendent Lucci said that it looks good to other parents if the teachers have their children enrolled in public schools. Superintendent Lucci therefore was only concerned that plaintiff had his son enrolled in a school other than the Steubenville City Schools. There is no evidence to indicate that if plaintiff's son had been enrolled in a non-religious affiliated private school, plaintiff would not have been treated the same way.

Additionally, while the Janes case is not binding precedent because the opinion is unpublished, in the absence of any binding Sixth Circuit case law to the contrary, the Court will follow Janes. See *In re Van Dresser Corp.*, 128 F.3d 945,948 (6th Cir. 1997). The Court in Janes concluded that the plaintiff only established that "the Bardstown school system excluded her from consideration because she sent her children to school elsewhere - not because she is Catholic." 1996 WL 536794 at *3. The Court further determined that a preference for religious education for their children "need not itself be an aspect of religious observance, practice, or belief." *Id* at *4. In the case at bar, plaintiff has failed to demonstrate that in sending his son to Catholic school, he was engaging in the type of "observance or practice" entitled to protection under Title VII. Defendants motion for summary judgment as to plaintiffs Title VII claim of religious discrimination is therefore granted.

C. § 1983 Claims

Plaintiff argues that defendants infringed on his fundamental right in the rearing of his child as protected by the Equal

Protection Clause and that defendants violated his constitutional right to the free exercise of religion. To maintain a claim against defendants under 42 U.S.C. § 1 983, plaintiff must establish: 1) that a person has deprived him of a federal right; and 2) that the person who has deprived him of that right acted under color of state or territorial law. See *Monroe v. Pape,* 365 U.S. 167, 171 (1961). Here, plaintiff is alleging that his fundamental right to rear his son and to free exercise of religion were deprived when defendants denied him a full-time teaching contract because he refused to enroll his son in Steubenville City Schools. Under § 1983, plaintiff has the initial burden of establishing that his conduct was constitutionally protected and this conduct was a substantial or motivating factor in the decision.

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." See U.S. Const. Amend. XIV, § § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985). See also *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1359 (6th Cir. 1992) ("Different treatment is the initial element of an equal protection violation."). To state a claim under the equal protection clause of the Fourteenth Amendment through § 1983, a plaintiff alleging discrimination must allege that a state actor intentionally discriminated against him because of his membership in a protected class. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990). A claim under the equal protection clause requires a plaintiff to prove the same prima facie elements as a disparate treatment claim

under Title VII. *Gutzwiller v.Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988).

Plaintiff has failed to set forth a prima facie, case of religious discrimination under Title VII. Plaintiff has attempted to establish that he was not hired as a full-time teacher with the Steubenville City Schools because his son attends Catholic school, however, plaintiff has only shown that he may not have been promoted because he sent his son to school elsewhere, not because he is Catholic. Therefore, defendants are entitled to summary judgment on plaintiff's § 1983 equal protection claim against them.

2. Free Exercise of Religion

The Free Exercise Clause of the First Amendment provides, in part, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof...." The First Amendment has been made applicable to the states and their political subdivisions by incorporation through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The Free Exercise Clause excludes all governmental regulation of religious beliefs. *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). This Clause protects not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief. *Id* (recognizing that "the exercise of religion often involves not only belief and profession but the performance of physical acts").

In the present case, there is no allegation that defendants are attempting in any manner to regulate the beliefs of plaintiff. Rather, plaintiff has argued that defendants are infringing upon his fundamental right to the free exercise of religion by demanding his son be removed from Catholic

school and enrolled in public school in order for plaintiff to obtain a full-time teaching position. The Court, however, has already determined that plaintiff has failed to establish a *prima facie* case of discrimination. Therefore, plaintiff's § 1983 free exercise of religious claim must also fail Defendants motion for summary judgment is therefore granted as to plaintiff's free exercise of religion claim under 42 U.S.C. § 1983.

3. Parental Rights

Plaintiff argues in his memorandum contra to defendants' motion for summary judgment that "his fundamental right to rear his son...was deprived when defendants denied him a full-time teaching contract because he refused to enroll his son in the Steubenville City Schools." Pl's Mem. Contra at 10. Plaintiff additionally cites to several cases recognizing that the Constitution protects familial relationships and practices. The Court therefore finds that the facts alleged in the complaint give rise to a claim for violation of plaintiff's parental rights to direct and control his son's education.

The Constitutional right of parents to raise their children without undue state interference is well established. As the Supreme Court remarked in *M.L.B.v.S.L.J.*, 519 U.S. 102 (1996),"[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *Id* at 116. The Supreme Court has long recognized that the Constitution protects familial relationships and practices. *Stanley v. Illinois,* 405 U.S. 645 (1972). The parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy rights. *Meyer v. Nebraska,* 262 U.S. 390 (1923). The Supreme Court stated in

Pierce v.Society of Sisters, 268 U.S. 510 (1925), that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id* at 535.

In *Troxel v. Granville,* 530 U.S. 57 (2000), the Court reiterated that the parental interest in "the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court ." *Id.* at 65. That case reaffirmed the validity of such long-standing precedents as *Meyer,* 262 U.S. 390 (right of parents to control education of their children), *Pierce,* 268 U.S. 510 (right to direct upbringing and education of children), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court said "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." See also *Wisconsin v. Yoder,* 406 U.S. 205, 232-33 (1972) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," particularly in matters of "moral standards, religious beliefs, and elements of good citizenship"). The *Yoder* Court further concluded that although a state may set forth minimum educational standard, "it may not pre-empt the educational process by requiring children to attend public schools." *Id* at 239.

The state's power to control education in schools is secondary to the rights of parents "to provide an equivalent education for their children in a privately operated school of [their] choice." *Norwood v. Harrison,* 413 U.S. 455,461 (1973). In the case at bar, plaintiff alleges that the Steubenville City Schools Board and Superientendent Lucci interfered with his familial rights to raise his son by requiring

him to enroll his son in public school before defendants would offer plaintiff a full-time teaching position. The Court therefore finds that plaintiff's decision to enroll his son in Catholic school and not to transfer him to Steubenville High School was within the penumbra of familial privacy tights guaranteed by the Constitution. See *Fyfe v. Curlee,* 902 F.2d 401,403 (5th Cir. 1990) (retaliation against a school employee who placed her child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy tights recognized by the Supreme Court."); *Stouch v. Crenshaw County Bd. of Educ*, 744 F.2d 1479 (11 th Cir. 1984)(a school board policy prohibiting employees from sending their children to private schools was found to interfere with the employees' exercise of their constitutional right to control the education of their children).

Having concluded that plaintiff has a constitutionally protected right to enroll his son in private school, the Court must now consider whether plaintiff's exercise of that right was a substantial factor in the decision not to hire him as a full-time teacher and terminate his position as a full-time substitute teacher with the Steubenville City Schools. Plaintiff has established through direct evidence of conversations between himself and Superintendent Lucci and Principals Holub and Young, that he would not obtain a full-time teaching contract unless he enrolled his son in the Steubenville City Schools. Defendant Superintendent Lucci even stated to plaintiff that it looks good to parents if teachers have their own children in public school. Furthermore, defendants have not offered any documentation of problems with plaintiff's teaching ability that would justify his sudden termination from substituting during the middle of a school day. Therefore, plaintiff has established that his decision to keep his son enrolled in the catholic school system was a substantial factor

in defendants decision to terminate his employment as a substitute and not to hire him as a full-time teacher.

D. Qualified Immunity

Defendants argue that defendant, Superintendent Lucci, who is sued in his individual capacity, is entitled to qualified immunity. Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct "'does not violate clearly established statutory or constitutional rights of which as reasonable person would have known.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, to determine if defendant Lucci is entitled to qualified immunity, the Court must determine: (1) whether the plaintiff has shown a violation of a constitutionally or statutorily protected right; and, (2) whether that right was clearly established such that a reasonable government official would have realized that their action was in violation of that right. *Sowards v. Loudon County,* 203 F.3d 426, 438 (6th Cir. 2000).

Plaintiff asserts that he was removed from his permanent substitute teaching position and denied a full-time teaching position because he refused to transfer his son from Catholic school to Steubenville City schools, exercising his right to direct the upbringing and education of his son. Although defendant Lucci contends that the hiring of a teacher is a discretionary function and he is therefore immune, he was the key decision maker in the decision to offer plaintiff full-time employment and the decision to terminate plaintiff's employment during the middle of the school day.

As discussed in the previous section, plaintiff has a constitutionally protected right to direct the upbringing and education of his child. *Pierce,* 268 U.S. 510. That

constitutional right further includes the right to provide an equivalent education in a privately operated school of the parent's choice. *Norwood,* 413 U.S. at 461. Plaintiff has therefore proven that defendant Lucci has violated his constitutionally protected right to send his child to private school. The Court must therefore determine whether that right is clearly established. The test to determine if a right is clearly established is to determine "'whether a reasonable official in the defendant's position could have believed that his conduct was lawful. . .'" *Pray v. city of Sandusky,* 49 F.3d 1 154, 1 157-1 158 (6th Cir. 1995).

The United States Supreme Court has continued to uphold the right of parents to control the education of their children. Meyer, 262 U.S. 390; *Pierce,* 268 U.S. 510, *Prince,* 321 U.S. 158, and *Yoder,* 406 U.S. 205. While these cases have dealt with state interference with the right of parents to direct the upbringing and education of their children, they have not addressed the issue of employment of a parent conditional upon where he sends his child to school. Nor has the Sixth Circuit addressed the issue, other than the *Janes* case which is unpublished. Ordinarily, to find a clearly established constitutional right, a district court within the Sixth Circuit must find binding precedent from the Supreme Court, the Sixth Circuit, or from that same district court. Ohio Civil *Serv. Employees Ass'n v. Seiter,* 858 F.2d 1171, 1177 (6th Cir. 1988). Although decisions of other courts can clearly establish the law, such decisions must both point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Id.* "It is only in extraordinary cases that we can look beyond Supreme Court and Sixth Circuit precedent to find "'clearly established law.'" *Walton v. City of Southfield,* 995 F.2d 1331, 1336 (6th Cir. 1993).

The Fifth Circuit in *Fyfe,* 902 F.2d at 403, held that retaliation against a school employee who placed her child in private school violates rights "'protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court.'" Additionally in *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985), the Fifth Circuit held that school board and superintendent violation the constitutional rights of a former public school employee when she was discharged from her job because her son attended a private academy rather than the local public school. Finally, in *Stouch*,744 F.2d 1479, the Eleventh Circuit held that a school board policy prohibiting employees from sending their children to private school interfered with the employees" exercise of their constitutional right to control the education of their children.

The Court finds that based on the caselaw cited above, federal circuit courts recognize that the right of a parent to direct the education of his child without the interference of a his employer is a clearly established right. A reasonable government official or other school administrator in a similar position as Superintendent Lucci, would have recognized that dictating where an employee of the school district can send his child to school infringes on the familial rights of that teacher. Defendant Lucci is therefore not entitled to qualified immunity.

IV. STATE LAW CLAIMS

Plaintiff also asserts state statutory claims of religious discrimination under O.R.C. § 4112.99, breach of contract, promissory estoppel and interference with present and/or prospective business relations.

A. O.R.C. § 4112.99

The state law concerning religious discrimination is identical to federal Title VII law insofar as the grounds for the Court's decision are concerned. Therefore, defendants motion for summary judgment as to plaintiff's state statutory claim of religious discrimination is granted.

B. Breach of Contract

In order to establish a breach of contract claim, plaintiff must prove: 1) the existence of a contract, which requires an offer, acceptance, and consideration, 2) performance by the plaintiff; 3) breach by the defendant; and 4) damage or loss to the plaintiff. *Kirkland v. St. Elizabeth Hospital Medical Center,* 34 Fed. Appx. 174, 178 (6th Cir. 2002). Plaintiff must also establish that there was a 'meeting of the minds' and the contract was definite as to its essential terms. *Id.*

Plaintiff maintains that "there was an offer from Superintendent Lucci for plaintiff to place the son in the Steubenville City Schools in order to receive a full time teaching contract." (Pl's Mem. Contra p. 23). Plaintiff then asserts that he accepted the offer and began to perform under the contract by working as a substitute teacher for the Steubenville City Schools. Defendants argue that plaintiff was an at-will employee and there was no meeting of the minds.

Ohio law presumes that employment contracts are terminable at will "unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other." *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153 (Ohio 1985). Here, defendant Lucci made representations to plaintiff that if plaintiff enrolled his son in Steubenville City Schools, then plaintiff could accumulate 60 consecutive days

as a substitute teacher, which would entitle him to a full-time teaching contract the following year. Plaintiff also acknowledges that Lucci told him at an earlier meeting that "I could not promise you a job because I may not be here next year, and I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." (Pl. Aff. ¶ 14). Except in the clearest cases, whether a contract was intended is a question of fact for the fact-finder to resolve. *Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584 (6th Cir. 1976). The Court therefore finds that there are disputed issues of material fact as to whether there was a meeting of the minds that precludes summary judgment on this issue.

C. Promissory Estoppel

"The elements of promissory estoppel are (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise." *Pertz v. Edward J. DeBartolo Corp.*, 188 F.3d 508 (6th Cir. 1999)(citing Restatement (Second) of Contracts §§ 90 (1973)). The test is "whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee ." *Mers v. Dispatch Printing Co.*, 483 N.E.2d at 151 (syllabus ¶¶ 3). The Ohio Supreme Court has further explained that "a demonstration of detrimental reliance on specific promises of job security can create an exception to the employment-at-will doctrine." *Helmick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212, 1217 (Ohio 1989).

The Court therefore finds, for essentially the same reasons set forth above in our discussion of plaintiff's breach of contract claim, that there is a genuine issue of material fact in this case as to whether plaintiff detrimentally relied on defendant Lucci's statements. Again, plaintiff has offered direct evidence that Superintendent Lucci promised him the opportunity to work 60 consecutive days as a substitute to eventually obtain a full-time teaching position. Plaintiff further claims that he detrimentally relied on Lucci's promise in rejecting an opening at Weirton Steel. Defendants' motion for summary judgment on plaintiff's promissory estoppel claim is therefore denied.

D. Interference with present and/or prospective business relations

Plaintiff claims that defendant Superintendent Lucci interfered with his prospective full-time teaching contract. To maintain a claim for tortious interference with prospective business relations, plaintiff must prove: 1) the existence of the prospect of a business relationship; 2) the defendant's knowledge of the plaintiffs prospective relationship; 3) the defendant's intentional and material interference with the plaintiffs prospective relationship; 4) the lack of justification; 5) a showing that but for the alleged interference, the plaintiff would have consummated the prospective relationship; and 6) resulting damages. *Chrvala v. Borden, Inc.*, 14 F.Supp.2d 1013, 1023 (S.D. Ohio 1998); *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415 (1995). In Ohio, "such interference must be intentional because Ohio does not recognize negligent interference with a business relationship." *Bauer v. Commercial Aluminum Cookware Co.*, 140 Ohio App.3d 193, 199, 746 N.E.2d 1173 (2000).

Plaintiff asserts that defendant Lucci interfered with his present and prospective contract during the 1999-2000 and 2000-2001 school years when he removed plaintiff from his substitute teaching position, thereby making it impossible for plaintiff to obtain his sixty consecutive days in the classroom. Plaintiff consistently refers to his contract, but has not proven the existence of an employment contract. Rather, plaintiff is an employee at-will for the Steubenville City Schools. Defendant Lucci therefore could not have interfered with a present business relationship. The issue of whether plaintiff was promised a full-time teaching contract is in dispute therefore, the Court is unable to determine if defendant Lucci interfered with a prospective business relationship. Defendants motion for summary judgment on this issue is therefore denied.

V. CONCLUSION

Based on the above, the Court GRANTS defendants' summary judgment motion as to plaintiff's federal and state claims of religious discrimination, plaintiff's claims of equal protection and free exercise of religion under 42 U.S.C. § 1983 and DENIES defendants' summary judgment motion as to plaintiff's § 1983 parental rights claim and remaining state law claims.

The Clerk shall remove document 34, document 42, and document 46 from the Court's pending motions list.

IT IS SO ORDERED.

/s/George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

(2)

No. 04-1409

Supreme Court, U.S.
FILED
JUL 28 2005
OFFICE OF THE CLERK

In the
Supreme Court of the United States

STEUBENVILLE CITY SCHOOLS; RICHARD LUCCI; DANIEL SPAHN; RUTH ANN BRUZZESE; WILLIAM KERR; WILLIAM HENDRICKS; RICHARD BEAL,

Petitioners,

v.

PATRICK BARRETT,

Respondent.

On Petition for a Writ of Certioriari to the United States Court of Appeals for the Sixth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORIARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding that Petitioner Superintendent Richard Lucci was not entitled to qualified immunity as to Respondent Patrick Barrett's claim brought under 42 U.S.C. § 1983 alleging denial of a constitutional right to parental control over his son's education. The Sixth Circuit determined that the Respondent alleged a violation of a constitutionally protected right and that that right was clearly established such that a reasonable government official would have realized that denying a promotion and/or terminating an employee for exercise of that right would be a violation. The Petition raises the following issues:

I. WERE THE CONSTITUTIONAL RIGHTS AT ISSUE CLEARLY ESTABLISHED SUCH THAT A REASONABLE PERSON WOULD HAVE KNOWN OF A VIOLATION OR WAS A COMPLICATED ANALYSIS REQUIRED AS PETITIONERS SUGGEST?

II. IS THERE A CONFLICT IN THE CIRCUITS WHERE THE FIFTH AND THE ELEVENTH CIRCUIT CASES INVOLVED WEIGHING EACH PARTY'S EVIDENCE TO DETERMINE LIABILITY IN TRIALS ON THE MERITS (OR A REVIEW OF FINDINGS ON THE MERITS) AND THIS SIXTH CIRCUIT CASE WHERE THE COURT COULD NOT WEIGH EVIDENCE FOR PURPOSES OF SUMMARY JUDGMENT?

III. SHOULD THE COURT HAVE ANALYZED PETITIONER SCHOOL DISTRICT'S INTEREST IN A MANDATORY ENROLLMENT POLICY WHERE PETITIONERS OFFERED NO EVIDENCE OF ITS EXISTENCE?

IV. DID PETITIONERS CLAIM AND ESTABISH UNDUE PREJUDICE REGARDING THEIR NOTICE OF RESPONDENT'S CONSTITUTIONAL CLAIM OF A RIGHT TO PARENTAL CONTROL?

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OPINION BELOW

Respondent Patrick Barrett was an Elementary School Teacher for Petitioners Steubenville City Schools. The Superintendent of the schools was Petitioner Richard Lucci and the Board Members of the District were Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks, and Richard Beal. Respondent maintains that Petitioners took adverse employment action against him in the form of denying him a promotion from a full-time substitute teaching position to a permanent full-time teaching position and terminated him from his full-time substitute teaching position. Respondent maintains that these adverse employment actions were taken against him because he chose to enroll his son in a Catholic school. He maintains that Petitioner Lucci attempted to coerce him to enroll his son in the Steubenville City Schools.

STATEMENT OF JURISDICTION

This Court should not invoke jurisdiction under 28 U.S.C. §1254 and Supreme Court Rules 10 (a) and (c) because the United States Court of Appeals for the Sixth Circuit has not entered a decision in conflict with any other Circuits and neither has the Sixth Circuit decided an important federal question in conflict with relevant decisions of this Court.

The Sixth Circuit's decision was issued on November 15, 2004. Petitioners sought a re-hearing *en banc* before the Sixth Circuit. The Petition for re-hearing *en banc* was denied on January 18, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Fourteenth Amendment, § 1 states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,

and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Procedural History.

On May 21, 2001, the Respondent brought suit in the United States District Court for the Southern District of Ohio. The Respondent alleged that he was discriminated under Title VII, 42 U.S.C. section 2000e et. seq. and that his civil rights were violated under 42 U.S.C. section 1983 based upon his termination and denial of a permanent teaching position because he disenrolled his son from the Petitioners' public school system and enrolled him in a private Catholic school. Petitioners filed their Motion for Summary Judgment on December 4, 2002. Respondent filed his Memorandum in opposition on January 13, 2003, a Motion to Supplement that Memorandum Contra with an Affidavit on January 30, 2003 and subsequently filed an amended response to his Memorandum Contra on January 30, 2003. Petitioners filed a Motion to Strike portions of Respondent's Response to Motion for Summary Judgment on February 3, 2003. Petitioners also filed their Reply to Respondent's Response opposing Summary Judgment

on February 3, 2003. Respondent Barrett filed a Response to the Motion to Strike on February 18, 2003. On March 4, 2003, Petitioners filed a Reply to Respondent's opposition to the Motion to Strike. On September 11, 2003 the Court issued an Order granting Petitioners summary judgment as to the Respondent's federal and state claims of religious discrimination, Respondent's claim of equal protection and free exercise of religion under 42 U.S.C. section 1983 and denied Petitioners' Summary Judgment Motion as to Respondent's section 1983 parental rights claim and remaining state law claims. Petitioners filed their Notice of Interlocutory Appeal on October 10, 2003. The appeal was denied by the Sixth Circuit on November 15, 2004. That decision was published as *Barrett v. Steubenville City Schools, et al.,* 388 F.3d 967 (6th Cir. 2004). *En banc* review was denied on January 18, 2005. Petitioners filed their Petition for Writ of Certiorari on April 15, 2005.

B. Factual Record.

This case involves Respondent Patrick Barrett who was a substitute teacher with Petitioner Steubenville City Schools. He taught at the elementary school level. He obtained his teaching certificate in elementary education in 1997 as well as his Bachelor's Degree in education in 1997 and his Master's Degree in Elementary Education in 2001. Petitioner Steubenville is the public school system of Steubenville, Ohio. It offers no religious instruction. In November 1998, after being laid off from Weirton Steel where he had been a pipefitter and welder, Respondent was hired to be a substitute teacher at Steubenville City Schools. After performing well, he was hired to be a long-term substitute teacher at Wells Elementary School with Petitioner Steubenville City Schools in January 1999, teaching the first grade. He filled in for the teacher who went on maternity leave. The period was initially for six

weeks, however, it turned into eight weeks because the teacher required additional time off. Mr. John Holub, Principal at Wells Elementary, asked the Respondent if he was interested in remaining on for the entire school year for a fourth grade teacher who had also taken a year off for maternity leave. Mr. Holub told the Respondent that Superintendent Charles Joyce[1] was happy with Mr. Barrett's job performance and asked if he would accept the fourth grade position. Mr. Barrett accepted the assignment with the hopes of receiving a full-time contract for the following school year.

In May 1999, the Respondent was to be interviewed for a full-time contract teaching position with Petitioner Steubenville. He spoke with Mr. Holub prior to that interview who told him that Mr. Lucci, who was then Assistant Superintendent but who would be taking over as Superintendent, would ask him about his son, Tyler, and where his son was attending school. Mr. Holub told Mr. Barrett that Mr. Lucci would not give him a contract unless his son attended Steubenville City Schools. Tyler Barrett, in the eighth grade at the time, was attending All Saints, a Catholic school. He had attended that School since Kindergarten. Tyler was considering becoming a priest. Mr. Barrett was indeed subsequently interviewed by three administrators, Superintendent Dr. Joyce, Anne Stevenson and Assistant Superintendent Richard Lucci. Dr. Joyce and Anne Stevenson asked Mr. Barrett about his education and experience and commended him for the good job he was doing at Wells Elementary. However, Petitioner Lucci asked him straight out about where his son would be attending school for the next school year. Mr. Barrett replied that his son was to finish his eighth grade year at All Saints, the School that he had been attending since kindergarten. Subsequent to the interview, Mr. Holub told Mr. Barrett that all three of the administrators were impressed with him however, Mr. Lucci did not like the fact that he was sending his son

[1] Superintendent Joyce preceded Petitioner Lucci as Superintendent.

to a Catholic school. Mr. Holub also indicated that Petitioner Lucci, who would be taking over as Superintendent at the beginning of the 1999-2000 school year (the school year for which Mr. Barrett had just interviewed for) would not give Mr. Barrett a contract until he moved his son out of the Catholic school and into the Steubenville City Schools.

During that summer, after Petitioner Lucci officially took over as Superintendent, two openings occurred for teaching positions. The Respondent received consideration for neither. Two weeks before school began, Petitioner Lucci hired a teacher to teach second grade who had never substituted before. It was traditionally the case that the School District would hire persons who had previously substituted within the District itself. Also, during an August 1999 interview with Superintendent Lucci, the Respondent informed him that Weirton Steel had recalled him back to work and that he needed to make a decision. He asked Petitioner Lucci for a full-time teaching contract with Steubenville City Schools. Mr. Lucci told Mr. Barrett that, "You have a future here." He also told him that, "I could not promise you a job because I may not be here next year, and I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." As a result of this promise to Mr. Barrett, Mr. Barrett declined to return to the full-time position at Weirton Steel and elected to put in another year as a substitute teacher with the thought that Mr. Lucci would award him a full-time teaching contract if he were still Superintendent at the time.

Mr. Barrett remained as a teacher at Wells Elementary as a long-term substitute teacher for the 1999-2000 school year. During that school year, he was often told that Petitioner Superintendent Lucci did not like where his son was attending school. In May 2000, John Holub, still Principal at Wells, informed the Respondent

that he would never receive a contract to teach full-time until he moved his son to Steubenville City Schools. Teacher Elizabeth Shenefield overheard this conversation and told Mr. Holub that the School District could not do that to Mr. Barrett, that it was illegal.

Petitioner Steubenville City Schools had a policy or practice of granting full-time contracts for teachers who taught for sixty days in the same classroom. On occasion, a teacher would be removed on the fifty-ninth day so as to avoid granting that teacher a full-time contract. Near the end of the 1999-2000 school year, when it was clear that Mr. Barrett would not place his son in Steubenville City Schools, Petitioner Lucci removed him from the classroom for three days, so that he could not get his sixty days in. Hence, he did not receive a full-time teaching contract as he had been promised. Also in May 2000, Respondent Barrett had a conversation with Superintendent Lucci. Superintendent Lucci told him that he should consider moving his son to the public school for at least one year, and he insisted that Tyler, his son, would like it. Now, under pressure to place his son in the Steubenville City School District, after having turned down the opening at Weirton, Respondent Barrett, under duress, enrolled his son in the Steubenville High School (known locally as "Big Red"). In June 2000, a full-time teaching contract was issued to another teacher and not to Respondent Barrett. Respondent Barrett learned in July of 2000 that additional positions were being filled at the School District. These positions were offered to persons, many of whom had not substituted in the School District.

In August 2000, Respondent Barrett again went to speak to Petitioner Superintendent Lucci about the situation. Petitioner Lucci immediately asked him how his son felt about attending Big Red. Mr. Barrett informed Mr. Lucci that his son was not happy. Mr. Lucci replied that he would get used to it. Mr. Barrett then

asked Mr. Lucci if, hypothetically, Tyler did not actually attend Big Red if it would be held against him [Respondent]. Mr. Lucci replied that indeed it would be held against him. Mr. Lucci then told him that if no other positions were open, even though it was going to "cost" him, that if Mr. Barrett returned as a long-term substitute, that this time, he would let him get his sixty days in so that he could receive a full-time teaching contract. He expressly told him that he would have a contract after his sixtieth day.

A new position in fact did open up a couple of weeks after the school year started. The Respondent attempted to communicate with Petitioner Lucci about this position. Finally, he did reach Mr. Lucci and he inquired about the open position. Mr. Lucci insisted that he was not going to fill this opening, but that the earlier agreement he had, to get the full sixty days in, was still in effect.

By this time, even though Mr. Barrett had enrolled Tyler in Steubenville High School, because his son had given him such serious opposition to attending the public high school, Mr. Barrett reconsidered his decision and disenrolled him. He re-enrolled him in Catholic Central High School. Mr. Holub left Wells as Principal and Melinda Young began as Principal of Wells in late August of 2000. One day before Mr. Barrett was to open his classroom at Wells, Mrs. Young came to him and asked him about his son. She said that Mr. Lucci would give him his contract if he sent Tyler to Big Red. Mr. Barrett told Mrs. Young to stay out of the matter and that where he sent his son was his own business.

On September 29, 2000, during the school day, Mrs. Young told the Respondent to report to Petitioner Superintendent Lucci's office. Upon arriving there, the Respondent met with Petitioner Lucci and Assistant Superintendent Richard Renallo. Petitioner Lucci, in an angry voice, told Mr. Barrett that he was being

removed from his position as a fourth grade substitute teacher at Wells Elementary. When Mr. Barrett inquired as to why, Lucci told him that he was being disloyal. Mr. Barrett asked how could he be disloyal when he had worked in the school district for 2 ½ years as a substitute. Lucci replied that he was being disloyal to him [Lucci]. Mr. Barrett reminded him of his agreement to grant him a contract after sixty days of teaching in the classroom. Petitioner Lucci, irate at this point, shouted that he never promised him a contract after sixty days. Lucci ordered him to clean out his classroom that very day. Mr. Barrett asked Mr. Lucci why did he always bring up his son during their conversations together. Lucci said that he thinks that the public high school would be better for his son. Mr. Barrett insisted that his son's school attendance was his responsibility and inquired as to why his loyalty and hard work given to the School District during this long time period, and the fact that he gave up a job with Weirton Steel were not indicative of loyalty, as opposed to where he sent his son to school. Mr. Lucci ignored this question.

Subsequent to the Respondent's dismissal from his fourth grade substitute teaching class, several of the parents of the children he had been teaching distributed a petition protesting the School Board's refusal to hire the Respondent as a permanent teacher. They were upset with the fact that he had been denied a position on "pretty unfortunate" grounds. In addition, subsequent to his dismissal as a long-term substitute for the fourth grade class at Wells and ultimate denial of a permanent teaching contract with the District, Mr. Barrett received favorable reference letters from John Holub. The Petitioners subsequently maintained that the Respondent was pulled from his fourth grade classroom in September/October 2000 because of his poor work performance and complaints about participating in a reading program.

SUMMARY OF ARGUMENT

Petitioner alleged that: (a) there was a conflict in the Circuits created by the Sixth Circuit's non-use of a balancing test in reaching its decision on qualified immunity; (b) Petitioner Lucci was required to be knowledgeable of two complicated constitutional principles and engage in a complex balancing test which could not have placed him on notice that his conduct would be unlawful; and (c) a constitutional violation was not alleged where the right was not asserted in a Complaint and only a passing reference was made in the Respondent's Reply Brief in Opposition to a Motion for Summary Judgment.

As to the argument regarding a conflict, Respondent maintains that there is no conflict between the Circuits. The Sixth Circuit did not utilize a balancing test in the Respondent's case because the question of qualified immunity for summary judgment purposes was being analyzed. In that situation, the factual assertions and inferences therefrom of the non-moving party are taken as true while the facts and inferences of the moving party are not considered.

As to the need to balance constitutional principles, the rights at issue in this case were clearly established by both precedent from this Court as well as from the Sixth Circuit. No case has held, in either the Fifth, Sixth or Eleventh Circuits, that a public employee may be terminated or denied a promotion because of where they elected to enroll their child in school.

Lastly, the Petitioners were clearly on notice of the right to parental control asserted by the Respondent because they referred to it in their own Motion for Summary Judgment, the Respondent referred to it clearly in his Memorandum Contra to that Motion for

Summary Judgment, and Petitioners replied to the argument in their Reply Brief. Moreover, Petitioners do not claim any form of prejudice nor have they shown any prejudice from any alleged lack of notice of the constitutional claim.

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE CONSTITUTIONAL RIGHTS AT ISSUE WERE CLEARLY ESTABLISHED SUCH THAT A REASONABLE PERSON WOULD HAVE KNOWN OF A VIOLATION.

Petitioners maintain that the constitutional right at issue had not been articulated in the Sixth Circuit. The District Court relied on cases outside of the Sixth Circuit in reaching its conclusion. However, the Sixth Circuit held that it did not need to rely on the District Court Opinion in its analysis. The Court noted that the cases referenced by the District Court pointed unmistakably to the unconstitutionality of the conduct and were clearly foreshadowed by direct applicable authority in the Supreme Court. *Barrett v. Steubenville City Schools*, 388 F.3d 967 (6th Cir. 2004), Appendix A, 8a-9a. However, while indicating that it was permissible for the District Court to rely on those cases in finding that the law was clearly established, the Sixth Circuit believed that it was unnecessary to do so. As a result, the Sixth Circuit relied upon Supreme Court and Sixth Circuit authority for finding that the right was clearly established. The Circuit Court may affirm a decision of the District Court if correct for any reason, including one not considered below. *U.S. Postal Service v. National Association of Letter Carriers, AFL-CIO*, 330 F.3d 747, 750 (6th Cir. 2003).

The Sixth Circuit held on page 6 of its Opinion that the right of a parent to direct the education of his or her child was clearly

established by United States Supreme Court precedent. Appendix A, 6a-7a. In addition, it was clearly established by United States Supreme Court precedent that it was unlawful to terminate a public employee solely on the basis of that employee's exercise of a constitutional right. The Court noted that the United States Supreme Court and the Sixth Circuit have repeatedly recognized that parents have a fundamental right to raise their children, including directing their children's education. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390, 400, 43 S. Ct. 625, 67 L.Ed.2d 1042 (1923) (recognizing the right of "the parent to give his [or her] children education suitable to their station in life"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L.Ed. 1070 (1925) (striking down state law that required parents to send their children to a public school for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Zelman v. Simmon-Harris*, 536 U.S. 639, 680, n.5, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring) (emphasizing that "[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"); *Ohio Ass'n. of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (recognizing that because parents have a constitutional right to "direct their children's education," organization has standing to bring claim on behalf of parents); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002) (stressing that "[b]oth Supreme Court precedent and our national tradition suggests that a family member's right to participate in child-rearing and education is one of the most basic and important associational rights protected by the Constitution"); *Runyon v. McCrary*, 427 U.S. 160, 178, 427 U.S. 160, 96 S. Ct. 2586, 49

L.Ed.2d 415 (1976) ("parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction..."). This line of cases clearly establish the Respondent's right to send his son to a Catholic school.

The cases cited as supporting the principle that it is unlawful to engage in adverse action toward a public employee solely due to that employee's exercise of his or her constitutional rights are as follows: *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972) (finding unconstitutional the non-renewal of a teaching contract on the basis of a teacher's exercise of a constitutionally protected interest); *Littlejohn v. Rose*, 768 F.2d 765, 769-70 (6th Cir. 1985) (finding that the refusal to rehire a non-tenured teacher violated the constitutionally protected right of privacy if such denial was based on the teacher's divorce); *Adkins v. Board of Education of Magoffin Co., Kentucky*, 982 F.2d 952 (6th Cir. 1993) (court overrules a motion to dismiss and found error in the lower court's grant of said motion where the plaintiff was denied employment with a school board simply because of her marriage to a person who the employer disliked); and *Montgomery v. Carr*, 101 F.3d 1117, 1127 (6th Cir. 1996) (finding that if the only motivation for a public official taking some adverse action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional). Thus, the denial of public employment based solely upon the Respondent's exercise of his right to educate his son in a Catholic school was clearly foreshadowed by United States Supreme Court and Sixth Circuit precedent giving notice to Petitioner Superintendent Lucci that his actions were illegal.

As to Petitioners' argument that there was insufficient notice because the right at issue was not specific, the Court noted that "the

Supreme Court has instructed that qualified immunity does not require '*the very action in question* [to] ha[ve] previously been held unlawful,' but rather '*in the light of the pre-existing law* the unlawfulness must be apparent'." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Furthermore, the Court added:

> Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to [send] his child to a private school. (*sic*).

Appendix B, 10a.

Hence, the very precedent cited by Petitioners actually supports the notion that Superintendent Lucci should have known that his actions were illegal. No two reasonable superintendents of public school systems could agree that the action taken by Petitioner Superintendent Lucci would be lawful. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed.2d 271 (1986). There is no support for the precision in legal authority that the Petitioners advocate.

Petitioners cannot argue that no Sixth Circuit case exists that specifically enunciates that a public school official cannot deny someone employment solely because that person chooses to send their child to a private school. *See, Janes v. Bardstown City School Board of Educ.*, 97 F.3d 1452, 1996 WL 536794 (6th Cir. September 20, 1996) (Appendix B) (genuine issue of material fact existed with regard to claim of unconstitutional refusal to hire teacher because she enrolled her children in parochial schools). Although *Janes* is unpublished, a party may cite an unpublished

disposition in relation to a material issue in a case where there is no published opinion on point. An unpublished case can have persuasive value. *Baer v. R&F Coal Co.* 782 F.2d 600 (6th Cir. 1986). It can also have limited precedential value. *McMeans v. Brigano*, 228 F.3d 674 (6th Cir. 2000). Even though Petitioners attempt to minimize the weight of this authority because it was an unpublished decision, it was persuasive because it relied upon Supreme Court and Sixth Circuit cases and in addition, the same authorities were cited in the decisions from the Fifth and Eleventh Circuits. All courts found the existence of the constitutional rights in question.

Petitioners' citation to *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L.Ed.2d. 818 (1999) is misplaced. In relying on this case, Petitioners argue that there are no two judicial opinions holding the practice in question to be unlawful. On the contrary, there are no opinions holding that the constitutional rights do not exist. Qualified immunity was not granted in any case cited by Petitioners. The right to educate one's child and not be subject to adverse employment action for doing so was clearly established in each of the cases cited by the Petitioners. There was some authority where that constitutional right was outweighed by a governmental interest as in the *Kelley* case, *supra*. However, that case was decided on the merits and was not at the summary judgment stage as Respondent Barrett's case was. On the other hand, there are several judicial opinions holding that conduct similar to Petitioner Lucci's was unlawful. None of these cases resulted in summary judgment for the employer. In sum, the rights at issue were clearly established such that a reasonable person would know that a promotion denial and/or a termination would be a constitutional violation. Petitioners' arguments to the contrary are meritless.

II. THERE WAS NO CONFLICT IN THE CIRCUITS BECAUSE THE FIFTH AND THE ELEVENTH CIRCUIT CASES INVOLVED WEIGHING EACH PARTY'S EVIDENCE TO DETERMINE LIABILITY IN TRIALS ON THE MERITS (OR A REVIEW OF FINDINGS ON THE MERITS) WHILE THE SIXTH CIRCUIT COULD NOT WEIGH EVIDENCE FOR PURPOSES OF SUMMARY JUDGMENT.

Petitioners allege that the Sixth Circuit did not engage in a balancing test in which the constitutional rights at stake are weighed against the state's interest, here, presumably, in pursuing its educational mission. However, Petitioners fail to note that at issue was whether or not summary judgment should be granted on the Respondent's claims: The District Court denied summary judgment and in doing so was obligated to weigh all inferences in favor of the Respondent and resolve any factual disputes in favor of the Respondent as well. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It was not a trial on the merits.

Petitioners argue that a balancing test has been used in the Fifth and Eleventh Circuits. This argument obfuscates the difference between the standards to be used at the summary judgment phase of a lawsuit and that to be used in a trial or hearing on the merits. As the Federal Rules of Civil Procedure state, and as this Court has reiterated in the case of *Reeves v. Sanderson*, 530 U.S. 133, 150, 120 S. Ct. 2098, 147 L.Ed.2d. 105 (2000), at the summary judgment phase, all inferences and factual disputes are to be resolved in the non-movant's favor. In this case, the Respondent claimed that he was terminated and denied a position to a full-time teaching position because he elected to send his son to a Catholic school. Petitioners disagree and assert that the Respondent's work

performance caused his removal from his full-time substitute teaching position and that financial considerations prevented his promotion to a full-time permanent teaching position. For purposes of summary judgment, the Court was not in a position to resolve this factual dispute. *Id.* The Court had to view the facts in the Respondent's favor and had to disregard all evidence favorable to the Petitioners for purposes of summary judgment. On the other hand, the balancing test cited by Petitioners would only be necessary in a trial on the merits or where an appellate court is assessing the evidence offered at trial. The case of *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), was a case where the court was asked to determine, on the merits, whether or not an anti-nepotism policy which required the transfer of a public school teacher was unconstitutional.[2]

There was no obligation for the Court to engage in a balancing test to determine whether or not a constitutional right is clearly established for purposes of determining the existence of qualified immunity. Qualified immunity is an affirmative defense that shields government officials forming discretionary functions from liability for civil damages provided that their conduct does not violate clearly established constitutional or statutory rights which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). On appeal, in viewing the facts in favor of the non-moving party for assessing summary judgment, the Court must decide whether a right was clearly established and whether a constitutional violation occurred.

To determine whether or not a right was clearly established such that a reasonable person would have known does not

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[2] The *Montgomery* case was relied upon by the dissent in the Sixth Circuit Opinion. Petitioners have heavily relied upon the position advanced in the Sixth Circuit dissent.

necessarily involve a "complex" balancing test as the Petitioners state. This argument completely misconstrues constitutional jurisprudence in the area of qualified immunity that has been established for over twenty years. The cases cited by the Petitioners only highlight the fact that the Courts have used a balancing test to either determine the merits *sua sponte* or to review the merits determination of the lower court. *Pickering v. Board of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563, 580, 88 S. Ct. 1731, 1740 (1968) (state court failed to examine evidence *de novo* and as a result the Supreme Court examined the evidence completely independently and afforded little weight to the factual determinations made previously); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990) (reviewing on appeal a trial court verdict; balancing test discussed in the context of determining if defendant employer produced any evidence of a state interest in promoting the efficiency of the school system); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985) (appellate court review of district court findings of fact); *Stough v. Crenshaw Country Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984) (appellate court review of a bench trial which assessed the conflicting interests between the constitutional right and the state asserted interest); *Kelley v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed.2d. 708 (1976) (Testimony was taken by the trial court and there was appellate review of the trial court determination on the merits); *O'Hare Trucking Serv., Inc. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353, 135 L.Ed.2d. 834 (1996)[3] (qualified immunity was not an issue, hence whether or not the right was clearly established was not an issue). Thus, a careful analysis reveals that there is no conflict in the Circuits.

[3] The discussion of governmental interests in *O'Hare* was done only to resolve an express conflict in the Circuits over the question of whether independent contractors had the same protection as public employees from termination for refusing to support a political party or its candidates unless political affiliation was a reasonable and appropriate requirement for the job in question.

III. THE COURT NEED NOT HAVE ANALYZED AN INTEREST IN A MANDATORY ENROLLMENT POLICY WHERE THE PETITIONERS DENY SUCH A POLICY EXISTED.

Petitioners never argued in the trial court litigation that there was a valid governmental interest in a mandatory enrollment policy and that such was the reason for the adverse action taken toward the Respondent. Petitioners, at all times, denied ever terminating the Respondent because he elected to send his son to a Catholic school. J.A. 59, 97, ¶ 4, 5; 98, ¶ 8-10. Having never claimed to have specifically denied employment to the Respondent because he sent his son to a Catholic School, Petitioners cannot now claim that in fact they did deny employment on this basis and that there was a governmental interest that outweighed the Respondent's assertion of his constitutional rights. J.A. 231. Petitioners discuss at length the various balancing tests of state interests involved in prior cases before this Court and the Sixth Circuit. However, where there has been no basis in the record below to assert such interests, such arguments should not be entertained by this Court. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569, 81 L.Ed. 755 (1937).

Even if there were a governmental interest in a mandatory enrollment policy asserted by Petitioners that should be analyzed as a possible substantial factor in the adverse employment actions taken toward the Respondent, there would be, in any case, issues of material fact as to whether the unconstitutional reason was the substantial factor for the adverse actions. This is because Respondent claimed that an unconstitutional abridgement was the substantial factor in the adverse actions. The two positions needed to be weighed by a trier of fact. Where there are genuine issues of material fact, summary judgment must be denied. Fed. R. Civ.

Proc. 56(c). Thus, even under the "balancing test" scenario offered by Petitioners, summary judgment would be properly denied.

IV. PETITIONERS DID NOT CLAIM NOR ESTABLISH UNDUE PREJUDICE REGARDING THEIR NOTICE OF RESPONDENT'S CONSTITUTIONAL CLAIM OF A RIGHT TO PARENTAL CONTROL.

Petitioners claim that no right to parental control was specifically pled in the Respondent's Complaint. Interestingly enough, Petitioners do not claim any form of prejudice resulting therefrom. Petitioners seem to take umbrage regarding the Court's recognition of the claim. However, undue prejudice is the standard that must be met, not umbrage. *Foman v. Davis*, 371 U.S. 178, 181-182, 192, 83 S. Ct. 227, 230 (1962).

This Court has stated that it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. The Rules themselves provide that they are to be construed to secure the just, speedy, and inexpensive determination of every action. Fed. R. Civ. Proc. 1. The real issue is whether or not there was surprise to the Petitioners so as to unduly prejudice their opportunity to respond to the constitutional claim raised. No such prejudice was argued nor shown by Petitioners. In fact, Petitioners specifically addressed the constitutional claim in their Motion for Summary Judgment. J.A. 60, n.7. Respondent then rebutted that position in his Memorandum Contra to the Motion for Summary Judgment. *Id.* 135-139. Petitioners then responded in their Reply Brief. *Id.* 234. No motion for a more definite statement had ever been filed in the case and no motion to reopen discovery was presented.

Courts have consistently held that pleadings are to be liberally construed. *Ellis v. Dyson*, 421 U.S. 426, 95 S. Ct. 1691, 44 L.Ed.2d 274 (1975). The Respondent maintains that the Complaint in and of itself could be liberally construed to include a right of parental control. The First claim for Relief states: "Violation of Civil Rights, 42 U.S.C. 1983." Then in paragraph 8, of the Complaint, it is alleged that: "Plaintiff was denied a full-time position with Defendant Steubenville because his son, Tyler Bennett was enrolled in a Catholic school." J.A. 9.

Even if the Complaint itself was insufficient, the Respondent clarified the claim. Petitioners relied on *Spadafore v. Gardner*, 330 F.3d 849, 853, in support of their position. The Sixth Circuit in Mr. Barrett's case expressly noted that unlike the plaintiffs in *Spadafore*, Respondent Barrett expounded upon his claim in his response to Defendants' Motion for Summary Judgment. The Court specifically noted that the first argument heading in Respondent's Memorandum Contra was entitled: "Material Issues of Fact Exist as to Plaintiff's §1983 Claim of Infringement of his Fundamental Right in the Rearing of his Child..." J.A. at 135. As a result, the Court found that the Respondent did sufficiently state a claim.

In none of the cases cited by the Petitioners had there been a subsequent clarification by the plaintiff(s) of the actual claims being brought. The *Spadafore* case was already referenced. Similarly, in the Petitioners' cites of *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003); *Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998); and *Webster v. Reproductive Health Services*, 492 U.S. 490, 512, 106 L. Ed.2d 410, 109 S. Ct. 3040 (1989), there was no subsequent clarification of the constitutional right at issue as there was in the case at bar. Petitioners' arguments should fail.

CONCLUSION

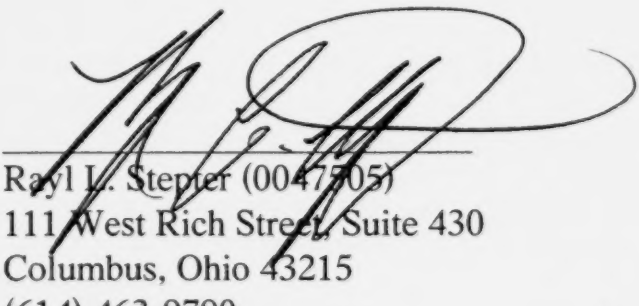
This case does not involve any questions of exceptional importance. Petitioners did not raise a single governmental interest in support of their adverse employment actions. They deny taking any adverse employment actions because the Respondent wanted his son to attend a Catholic school. Instead, Petitioners alleged that the Respondent was never terminated, was denied a full-time permanent teaching position due to the School District's financial position, and was removed from his full-time substitute teaching position for work performance reasons. J.A. 59; 97, ¶ 4, 5; 98, ¶ 8-10. It is only now, when seeking to petition their case before this Court, that there is discussion of an alleged governmental interest. Because there was no governmental interest claimed in the trial court proceedings, there was no need for the Court to address or discuss a balancing test.

Secondly, there is no conflict between the Circuits. For the very same reasons cited above, the Sixth Circuit had no need to apply a balancing test. Petitioners have created an illusory conflict in order to justify having their case heard before this Court. Petitioner Lucci was on notice that taking an adverse employment action against a public school teacher because he elected to place his son in a Catholic school was illegal because both the right to educate one's child was clearly established and the illegality of terminating a public employee solely because of his or her exercise of a constitutional right was clearly established as well. These two legal principles clearly foreshadowed and established the further legal principle that terminating (or committing other adverse employment action against) a teacher solely because he exercised his constitutional right to send his son to a Catholic school was illegal. Thus qualified immunity is not available. In the *Janes* case, *supra*, as well as the *Stough* and *Fyfe* cases, *supra*, it was

established that a teacher may not be the recipient of an adverse employment action solely because of the exercise of his or her constitutional right to direct the education of their son or daughter.

Lastly, Petitioners never claimed prejudice before and do not claim prejudice now regarding an alleged lack of Respondent's claim of violation of his right to raise his son. Petitioners were clearly on notice that a right to parental control was at issue in the Respondent's lawsuit. The right may be inferred from the Complaint that was filed. The Petitioners also anticipated that the right was being claimed and argued that there were no material issues of fact in support of the claim in their Motion for Summary Judgment. Respondent argued the parental claim in his Memorandum Contra opposing summary judgment, and Petitioners filed a rebuttal in their Reply Brief. As such, there was no undue prejudice to the Petitioners pertaining to the claim brought before the Court. As such, on all accounts, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals
Sixth Circuit

PATRICK BARRETT,

Plaintiff-Appellee,

v.

STEUBENVILLE CITY SCHOOLS,
Richard Lucci, in his individual capacity only,
Daniel Spahn, in his official capacity only,
Ruth Ann Bruzzese, in her official capacity only,
William Kerr, in his official capacity only,
William Hendricks, in his official capacity only,
and Richard Beal, in his official capacity only,

Defendants-Appellants.

No. 03-4373.

Submitted: Aug. 11, 2004.
Decided and Filed: Nov. 15, 2004.
Rehearing En Banc Denied Jan. 18, 2005.

Before: KEITH, MARTIN, and ROGERS, Circuit Judges.

KEITH, J., delivered the opinion of the court, in which MARTIN, J., joined. ROGERS, J. (pp. 974-76), delivered a separate dissenting opinion.

OPINION

KEITH, Circuit Judge.

Defendants-Appellants Steubenville City Schools, Superintendent Richard Lucci, in his individual capacity only, and Board Members,

Daniel Spahn, Ruth Ann Bruzzese, William Kerr, William Hendricks, and Richard Beal, in their official capacities only, appeal the district court's denial of qualified immunity in this action claiming a deprivation of plaintiff's First and Fourteenth Amendment rights in defendants' failure to offer plaintiff a permanent teaching position. For the reasons that follow, we AFFIRM the district court's decision.

I. BACKGROUND

Plaintiff-Appellee, Patrick Barrett ("Barrett"), received his Bachelor's degree in education in 1997 and was subsequently certified to teach elementary education. In November 1998, Wells Elementary School ("Wells"), a Steubenville City School, hired Barrett as a substitute teacher. Beginning in January 1999, Barrett substituted for an eight-week term, taking the place of a first grade teacher on maternity leave. The principal at Wells, John Holub ("Holub"), then offered Barrett a substitute teaching position for the remainder of the school year to take the place of a fourth grade teacher on maternity leave. Barrett accepted the position with the hope of receiving a full-time teaching contract for the following school year.

In May 1999, Barrett was scheduled to be interviewed for a full-time teaching position with Steubenville City Schools. Prior to the interview, Holub advised Barrett that Richard Lucci ("Lucci"), who would be assuming the position of Superintendent during the next school year, would not give Barrett a teaching contract unless his son attended Steubenville City Schools. From the time that he was in kindergarten, Barrett's son had attended All Saints, a Catholic school. After Barrett's conversation with Holub, Barrett was interviewed by Steubenville City Schools administrators, including Lucci, then-Assistant Superintendent. Lucci asked Barrett where his son would be attending school the following year, and Barrett told him that his *969 son would finish the eighth grade next year at All Saints. After the interview, Barrett had another conversation with Holub, who again indicated that Lucci would not give Barrett a teaching contract until he moved his son out of All Saints and into Steubenville City Schools.

During the summer of 1999, two teaching positions became available. Barrett did not receive an offer for either position. In fact, a teacher who had not substituted with Steubenville City Schools was hired, despite a tradition within the school district to hire teachers who had previously substituted.

In August 1999, Barrett again interviewed with now Superintendent Lucci and informed him that his former job had recalled him back to work and he needed to make a decision. Barrett asked Lucci for a full-time teaching contract with Steubenville City Schools. Barrett

claims that Lucci told him, "I can't promise a job if someone new is in this position, but if I am, you have a future here because you do such a good job." Barrett claims that he relied on this promise in declining to return to his full-time position with his former employer and instead served for another year as a substitute teacher.

During the 1999-2000 school year, Holub often expressed to Barrett Lucci's disapproval of Barrett's son attending private school. Barrett claims that in May 2000, Holub once again told Barrett that he would never receive a full-time teaching contract until he enrolled his son in Steubenville City Schools. Also in May 2000, Lucci informed Barrett that he should consider moving his son to public school for at least one year, insisting that Barrett's son would like it. Barrett claims that he was under such pressure, especially after turning down full-time employment with his former employer, that during the summer he enrolled his son in Steubenville High School for the 2000-01 school year. Even after he enrolled his son in Steubenville City Schools, Barrett was not offered teaching positions when they became available.

In August 2000, Barrett again went to speak with Lucci about his position. Lucci asked Barrett how his son felt about changing schools, and Barrett replied that his son was unhappy. Lucci informed Barrett that "it would be held against him" if his son did not attend Steubenville High School. Lucci also explained to Barrett that the school board liked for teachers to enroll their children in the public school system because it "looked good" to those parents whose children attended Steubenville City Schools. Lucci stated that if Barrett returned as a long-term substitute, then he would be given a full-time contract after his sixty-day period was complete. [FN1]

FN1. Steubenville City Schools had a policy or practice that granted full-time contracts to teachers who taught for at least sixty days in the same classroom. J.A. at 129.

Barrett began the 2000-01 school year as a full-time substitute teacher with the expectation that he would receive a full-time teaching contract. Barrett, however, reconsidered his decision regarding his son's education, removed him from Steubenville High School, and enrolled him in Catholic Central High School. On September 29, 2000, Barrett met with Lucci and the Assistant Superintendent. Barrett claims that Lucci told him that he was being removed from his position as a fourth grade substitute teacher at Wells. When Barrett questioned Lucci about the reason for his removal, Lucci told him that he was being disloyal. Lucci also expressed that he thought public high school would be better

for Barrett's son. Barrett then reminded Lucci of his agreement to grant him a full-time contract after Barrett completed his sixty days of teaching in *970 the classroom. Lucci became irate, denied ever making such a promise, and ordered Barrett to clean out his classroom that day.

Consequently, in June 2001, Barrett filed suit in the district court against Defendants-Appellants Steubenville City Schools, Superintendent Lucci, in his individual capacity, and Board Members Spahn, Bruzzese, Kerr, Hendricks, and Beal, in their official capacities only. Barrett asserted several claims, including: civil rights violations under 42 U.S.C. § 1983, religious discrimination under Ohio law, breach of contract, promissory estoppel, and tortious interference with present contractual relations or prospective contractual relations or both. Defendants filed a motion for summary judgment. The district court granted Defendants' motion as to Barrett's federal and state claims of religious discrimination and as to Barrett's claim of equal protection and free exercise of religion under 42 U.S.C. § 1983. The district court denied, however, defendants' motion as to Barrett's parental rights claim under § 1983 and the remaining state law claims. Defendants timely filed this appeal.

The only issue before us on appeal is whether Lucci is entitled to qualified immunity. In answering that question, we must determine whether the district court erred in finding that there is a clearly established constitutional right for parents to direct the education of their children and that Lucci's actions violated that right. For the reasons that follow, we find that the district court did not err in its conclusion.

II. DISCUSSION

A denial of summary judgment is ordinarily not a final judgment and therefore not reviewable on appeal. Hoover v. Radabaugh, 307 F.3d 460, 465 (6th Cir.2002). The present case, however, involves a decision by the district court to deny qualified immunity to a public official accused of violating plaintiff's constitutional rights. "[D]istrict court denials of qualified immunity may be appealed as collateral orders where (1) the defendant is a public official asserting the defense of qualified immunity, and (2) the issue appealed concerns not which facts the parties might be able to prove, but whether certain alleged facts reflect a violation of clearly established law." Id. (citations omitted). Because Defendants are not challenging the facts but rather claim that they did not violate the law, the jurisdictional requirements are met in the present case.

[1] [2] [3] [4] Whether qualified immunity applies to an official's actions is a question of law that this court reviews de novo. Virgili v. Gilbert, 272 F.3d 391, 392 (6th Cir.2001). Qualified immunity is an

affirmative defense that shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Once the defense is raised, the plaintiff bears the burden of showing that the defendant's conduct violated a right so clearly established that a reasonable official in that position would have clearly understood that he or she was under an affirmative duty to refrain from such conduct. Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir.1992). The plaintiff, thus, bears the ultimate burden of proof to show that the defendant is not entitled to qualified immunity. Wegener v. Covington, 933 F.2d 390, 392 (6th Cir.1991). On appeal, in viewing the facts in favor of the plaintiff, we must decide first whether a constitutional violation occurred and second whether that right was clearly established. Hoover, 307 F.3d at 465.

*971 A. Violation of Constitutional Right

[5] "To state a cause of action under § 1983, a plaintiff must allege the deprivation of a right secured by the United States Constitution or a federal statute by a person who was acting under color of state law." Spadafore v. Gardner, 330 F.3d 849, 852 (6th Cir.2003). In this case, Barrett has filed a complaint where the first claim for relief is entitled "Violation of Civil Rights, 42 U.S.C. § 1983." Second Amended Complaint ¶ 10. In his complaint, under this particular claim, Barrett alleged that he was told by Defendant Lucci "that the school board wanted the children of its teachers enrolled in Steubenville City schools." Id. Barrett alleged that Holub told him that "Lucci was impressed with Plaintiff Patrick Barrett's qualifications but that he would not be hired for a full-time position because Plaintiff's son attended a Catholic school." Id. ¶ 8. Barrett also alleged that he was denied full-time teaching positions while his son was enrolled in private school, but once he enrolled his son in Steubenville City Schools, Lucci promised him a full-time contract. Id. ¶ 12. Finally, Barrett alleged that, after Barrett removed his son from public school and re-enrolled him in private school, Lucci terminated Barrett for being disloyal. Id. ¶ 13. After citing the factual allegations, Barrett then indicated that the Defendants deprived him of not only his First Amendment right to freedom of religion, but also of "equal protection under the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶ 14.

Appellants argue that these allegations and legal assertions are insufficient to show a violation of Barrett's constitutional right to direct the education of his child. To support their argument, Appellants cite our

recent decision in Spadafore v. Gardner. In Spadafore, we reviewed a dismissal of § 1983 claims against defendants in their individual capacity. 330 F.3d at 852. We found that the plaintiffs' claims of § 1983 violations "were not adequately set forth in their complaint." Id. at 853. In so finding, we noted that "nowhere in the complaint [wa]s § 1983 specifically invoked against the individual defendants." Id. at 852. We also indicated that "[f]rom the language of the complaint, one cannot ascertain which substantive constitutional rights were allegedly violated. Nor was this clarified in the [plaintiffs'] response to the defendants' motion for summary judgment." Id. at 853.

[6] Here, the facts are clearly distinguishable. First, Barrett provided a detailed description of the alleged violations. He asserted that Lucci not only conditioned his full-time employment on where his son attended school, but also terminated him once his son was removed from public school. Barrett specifically pleaded these allegations under the claim for § 1983 violations. Additionally, unlike the plaintiff in Spadafore. Barrett clarified any possible confusion in his response to Defendants' motion for summary judgment. [FN2] We, therefore, find that the facts as alleged by Barrett set forth a claim that Lucci violated his constitutional right to rear his child.

FN2. In Plaintiff's Memorandum Contra Defendants' Motion for Summary Judgment, the first argument heading is entitled "Material Issues of Fact Exist as to Plaintiff's § 1983 Claim of Infringement of His Fundamental Right in the Rearing of His Child as Protected by the Equal Protection Clause and the First Amendment Free Exercise Clause." J.A. at 135.

B. Constitutional Right Clearly Established

Once we have found a violation of a constitutional right under the plaintiff's *972 facts, we must then determine if that right was clearly established. Hoover, 307 F.3d at 465. We look to whether a reasonable official would understand that his actions violated that right. Id. at 468. This court has emphasized that "to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir.1988). In an extraordinary case, decisions of other circuits may be used to clearly establish a principle of law if they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on

constitutional grounds, would be found wanting." Id. A few admittedly novel opinions from other circuit or district courts are not enough to form the basis for a clearly established constitutional right in the Sixth Circuit. Id.

[7] Here, the district court correctly determined that the right to direct the education of one's child was clearly established. Both the Supreme Court and this court have repeatedly recognized that parents have a fundamental right to raise their children, including directing their children's education. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (recognizing the right of "the parent to give his children education suitable to their station in life"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (striking down state law that required parents to send their children to a public school for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Zelman v. Simmons-Harris, 536 U.S. 639, 680 n. 5, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring) (emphasizing that "[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"); Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419, 422 (6th Cir.1996) (recognizing that because parents have a constitutional right "to direct their children's education," organization has standing to bring claim on behalf of parents); Johnson v. City of Cincinnati, 310 F.3d 484, 489 (6th Cir.2002) (stressing that "[b]oth Supreme Court precedent and our national tradition suggest that a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution"). More specifically, the Supreme Court has also indicated that "parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction ...." Runyon v. McCrary, 427 U.S. 160, 178, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Thus, it is clearly established that parents have a fundamental right to direct the education of their children.

That Barrett has the fundamental right to educate and raise his children, in and of itself, does not provide Lucci with clearly established law that his actions violated this right. There is, however, precedent from both the Supreme Court and the Sixth Circuit that makes clear that Lucci's actions violated Barrett's fundamental parental right. In Perry v. Sindermann, the Supreme Court found unconstitutional the nonrenewal of a teaching contract on the *973 basis of a teacher's exercise of a constitutionally protected interest. 408 U.S. 593, 597, 92 S.Ct. 2694, 33

L.Ed.2d 570 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). We have decided several cases applying the principle of law set forth in Perry. In Littlejohn v. Rose, we found that the refusal to rehire a non-tenured teacher violated the constitutionally protected right of privacy if such denial was based on the teacher's divorce. 768 F.2d 765, 769-70 (6th Cir.1985) ("It is clear from the Supreme Court's analysis in Perry that a person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty constitutes an impermissible reason for denying employment."). In Adkins v. Board of Education of Magoffin County, Kentucky, plaintiff was denied employment with a school board simply because of her marriage to a person who her employer disliked. 982 F.2d 952 (1993). In finding that the district court erred in granting defendants' motion to dismiss, we specifically stated that "[w]hile the plaintiff had no contractual right to a job, she could not be deprived of her public employment for exercising a constitutional right." Id. at 955. Similarly, in Montgomery v. Carr, we found that "[i]f the only motivation for a public official in taking some adverse employment action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." 101 F.3d 1117, 1127 (1996). Therefore, based on precedent specific to this court, the government cannot deny someone employment simply because that person is exercising his fundamentally protected right. [FN3]

FN3. The dissent argues that a "public employer can insist that employees waive certain rights," dissent at 975, and summarizes the ultimate holding of this court in Montgomery to support its assertion, id. (noting that "this court upheld a school district's anti-nepotism policy, which required the transfer of one employee because that employee was married to another employee, despite the right to marry"). While our ultimate holding in Montgomery found that there were legitimate reasons for a school's anti-nepotism policy, the dissent overlooks the court's language marking as unconstitutional a public employer's adverse employment action based only on a protected right. Here, we have just that. Unlike the case in Montgomery, we are not deciding this case on the merits; in viewing the facts in favor of Barrett, he was denied employment only because he was exercising his right to educate his son in a manner of his choice.

[8] In this case, Barrett made a decision to send his son to private school. Barrett's choice in directing his son's education is activity shielded by his constitutionally protected right of liberty. The Defendants

do not dispute that. Because it has been clearly established that one's involvement in constitutionally protected activity cannot be the sole basis for denying public employment, any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law.

Nevertheless, Defendants argue that "[t]here is no clearly established line of cases out of the Supreme Court or this Circuit which establish that dictating where public school employees send their children to school violates the employees' parental rights." Appellants' Br. 13. Defendants would have us find that the district court erred by relying on other circuits in its analysis. [FN4] The cases referenced *974 by the district court point unmistakably to the unconstitutionality of the conduct complained of and are clearly foreshadowed by applicable direct authority in the Supreme Court. See, e.g., Pierce, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Perry, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570. While it was therefore permissible for the district court to rely on these cases in finding that the law was clearly established, it was unnecessary. We do not adopt the district court's analysis, [FN5] for we need not rely on law outside of our jurisdiction to find that a clearly established right exists.

FN4. In its opinion, the district court cited precedent from the

Fifth and Eleventh Circuits to support the proposition that dictating where an employee of the school district can send his child to school infringes on the familial rights of that teacher. See Fyfe v. Curlee, 902 F.2d 401, 403 (5th Cir.1990) (holding that retaliation against a school employee who placed her child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court"); Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479 (11th Cir.1984) (holding that a school board policy prohibiting employees from sending their children to private schools interfered with employees' constitutional right to control the education of their children).

FN5. "We may affirm a decision of the district court if correct for any reason, including one not considered below." U.S. Postal Serv. v. Nat'l Ass'n. of Letter Carriers, AFL-CIO, 330 F.3d 747, 750 (6th Cir.2003).

The Supreme Court has instructed that qualified immunity does not require "the very action in question [to] ha[ve] previously been held

unlawful," but rather "in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (emphasis added). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to his child to a private school. [FN6] As aforementioned, Barrett has a constitutionally protected fundamental right to educate his child at the school of his choice. There is also a clearly established law that forbids employers from denying one employment based only on "person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty." Adkins, 982 F.2d at 955 (citing Littlejohn, 768 F.2d at 769-70). In accordance with these fundamental principles of law, Lucci cannot obtain qualified immunity by claiming that no clearly established right existed.

FN6. This court has, in fact, addressed this issue. See Janes v. Bardstown City Sch. Bd. of Educ., 97 F.3d 1452, 1996 WL 536794 (6th Cir. Sept.20, 1996). In Janes, a teacher sued the public school system alleging that she was not considered for a teaching position because her children attended parochial schools. We held that summary judgment was not warranted when there are facts in dispute as to whether "defendants violated Mrs. Janes' federal constitutional right to direct the education of her children." Id. at *1.

III. CONCLUSION

In sum, we reiterate that parents have a constitutionally protected liberty interest in raising and directing the education of their children. A state employer cannot condition employment upon the waiver of that right. For these reasons, we AFFIRM the judgment of the district court in denying Lucci qualified immunity.

ROGERS, Circuit Judge, dissenting.

Qualified immunity protects the private funds of an official sued in his individual capacity for actions that have not been clearly established to be unconstitutional, even if the actions are later determined

indeed to have been unconstitutional. Even assuming that the termination of a *975 public school teacher for not sending his children to the public schools is unconstitutional, [FN1] it is not clearly established to be unconstitutional. This is because the legal conclusion results from a balance that has not been definitively made by the Supreme Court, the Sixth Circuit, or even by federal courts in general.

FN1. Although, for purposes of this dissent, I assume that Barrett's termination was unconstitutional, this is not necessarily the case. If this court were to apply a test similar to that applied in Montgomery v. Carr, 101 F.3d 1117 (6th Cir.1996), a case addressing an anti-nepotism policy and the right to marry, this court could conclude that only rational basis scrutiny was warranted for Barrett's claim. See id. at 1124-29. And under a rational basis analysis, the government's interest in eliminating the inference that public schools are of lesser quality than private schools, an inference that can be drawn when a public school teacher sends his child to private school, may be sufficient to justify the requirement imposed on Barrett.

The majority concludes that "any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law." And yet, such a right has not been articulated in the Supreme Court or this circuit. Rather, the majority constructs this right from the parts of two others: the fundamental right of a parent to raise his or her children and direct their education, which is clearly established, and a right the majority describes as a right not to be denied government employment because of a decision to exercise a fundamentally protected right. This second "right" is not a right in all contexts, and has certainly not been clearly established in the context presented by this case.

Public employees can be required to give up some of their constitutional rights, although certainly not all of them. The public employer can insist that employees waive certain rights, but cannot insist that employees waive others. It is concededly clearly established that public employers cannot require their employees to vote a certain way, to go to religious services, or to do a number of other things that are unrelated to the public employment. This explains the cases relied upon by the majority, such as Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (public criticism of college's board of regents), Littlejohn v. Rose, 768 F.2d 765 (6th Cir.1985) (divorce), and Adkins v. Board of Education, 982 F.2d 952 (6th Cir.1993) (marriage to a particular person). On the other hand, public employers can require

employees to give up some constitutional rights, such as the right to read the newspaper all day, or the right to proselytize all day, where the restriction is sufficiently related to the purpose of the employment. For instance, in Montgomery v. Carr, 101 F.3d 1117 (6th Cir.1996), a case relied upon by the majority opinion, this court upheld a school district's anti-nepotism policy, which required the transfer of one employee because that employee was married to another employee, despite the right to marry. And in Flaskamp v. Dearborn Public Schools, 385 F.3d 935 (6th Cir.2004), this court upheld a school board's decision to deny tenure to a teacher who had a relationship with a student, despite the right to intimate association.

Telling a teacher where his child may go to school may fall somewhere in between. Just the two clearly established propositions, (1) that parents have a right to send their children to nonpublic schools and (2) that public employers cannot make employees give up all their constitutional rights, do not, even together, clearly establish the conclusion (3) that public school employers cannot require teachers to put their own children in the public schools. Conclusion (3) may result from a careful *976 examining and balancing of the interests in (1) with the need of schools to have teachers demonstrate commitment to the public schools, but it cannot be said that such a conclusion is clearly established.

Under the proper test, in order for a right to be considered clearly established, it must be " 'so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.' " Akers v. McGinnis, 352 F.3d 1030, 1042 (6th Cir.2003) (quoting Dominque v. Telb, 831 F.2d 673, 676 (6th Cir.1987)). Or, as this court has said elsewhere, " '[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.' " Saylor v. Bd. of Educ., 118 F.3d 507, 515 (6th Cir.1997) (emphasis in original) (quoting Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1150 (11th Cir.1994) (en banc)). On the facts of this case, it is not clear that "every like-situated, reasonable government agent" would have clearly understood that the right to direct the education of one's children should be combined with a balancing test used to determine what rights a public employer can require a public employee to give up, with the result that a public school can not require a public school teacher to send his or her child to that public school. Accordingly, Superintendent Lucci should be accorded qualified immunity in this case.

APPENDIX B

97 F.3d 1452 (Table), 1996 WL 536794 (6th Cir.(Ky.))
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Joyce Brooks JANES, Plaintiff-Appellant,

v.

BARDSTOWN CITY SCHOOLS BOARD OF EDUCATION et al., Defendants-Appellees.

No. 95-5531.

Sept. 20, 1996.

On Appeal from the United States District Court for the Western District of Kentucky, No. 93-00349; John G. Heyburn, II, Judge.

W.D.Ky.

VACATED IN PART, AFFIRMED IN PART.

Before: GUY, NELSON, and BATCHELDER, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

**1 This is an appeal from a judgment for the defendants in an employment discrimination case. The plaintiff, Joyce Brooks Janes, alleges in her complaint that she was denied consideration for appointment to a teaching position in the public school system of Bardstown, Kentucky, because she sent her children to parochial schools and not to the Bardstown public schools. The complaint asserts that in so excluding her from consideration, the defendants--the public school system's board of education, the individual members of the board, and the system's superintendent and assistant superintendent--infringed upon the exercise of her right to "familial privacy," among other things, in violation of 42 U.S.C. §§ 1983 and in violation of Kentucky law. As amended, the complaint also asserts claims of age discrimination under §§ 1983 and under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§§§ 621 *et seq.*, as well as a claim of religion-based discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§§§ 2000e *et seq.*

The district court dismissed the age discrimination claim for failure to exhaust administrative remedies; granted summary judgment to the defendants on the other federal claims; and dismissed the pendent state claims without prejudice. We conclude that a genuine issue of material fact is presented with respect to the claim that the defendants violated Mrs. Janes' federal constitutional right to direct the education of her children. We shall vacate the district court's judgment insofar as that claim and the pendent state claims are concerned, while affirming the rest of the judgment.

I

In June of 1992 Mrs. Janes applied for a job as an elementary school music teacher in the Bardstown city schools. Mrs. Janes, a Roman Catholic, had been teaching music for six years in the Catholic school system. She had previously taught music in the public schools. All of Mrs. Janes' school-aged children were enrolled in the parochial schools at the time she applied for the job in question here.

Bardstown's assistant school superintendent, defendant Patrick Hagan, reviewed some 19 applications that had been submitted for the vacant position in the music department. Dr. Hagan forwarded the names of five applicants--not including Mrs. Janes'--to the elementary school principal, Merrylen Sparks. After interviewing four of the applicants (the fifth had withdrawn), Ms. Sparks selected a woman named Jennifer Beaver for the job. Ms. Beaver had been teaching for about one year, and none of the other people interviewed had much more teaching experience than Ms. Beaver did.

After learning that she was not to be hired, Mrs. Janes had a meeting with Dr. Hagan. According to an affidavit subsequently filed by Mrs. Janes with the Equal Employment Opportunity Commission, Dr. Hagan (who, like Mrs. Janes, is a Roman Catholic) first told her that she had not been granted an interview because she was overqualified for the position. Later in the conversation, according to Mrs. Janes, Dr. Hagan said this: "May I be perfectly blunt? You were not granted an interview because your children attend the parochial school system and, if you do not think our system is good enough for your children, you have no right to teach here." Dr. Hagan allegedly went on to say that no teachers with children in parochial schools "have been hired in the last five to six years because I've seen to it." **2 Dr. Hagan recounts the conversation somewhat differently. When Mrs. Janes asserted that she was the most qualified person for the job, according to Dr. Hagan, he told her that her experience was not an advantage. Because of her many years of teaching, he explained, the school district would have to pay her much more than it would have to pay a less experienced applicant. He also suggested that less experienced teachers could adapt more easily to Kentucky's recent educational "reforms." A further disadvantage cited by Dr. Hagan was that Mrs. Janes' private school teaching experience would not transfer well to a public setting. "Even her experience as a parent," Dr. Hagan added, "was all private." Dr. Hagan did not recall having made the statements that Mrs. Janes attributed to him about disqualification by reason of parochial school patronage.

We must take it as given that parents have a constitutional right to send their children to private schools. See *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925), where the Supreme Court characterized as "entirely plain" a constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children under their control." *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972). And established precedent teaches that a state may not ordinarily condition the exercise of this right upon the surrender of an opportunity for public employment. See *Fyfe v. Curlee,* 902 F.2d 401, 403 (5th Cir.) (retaliation against school employee who placed child in private school violates rights "protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court"), *cert. denied,* 498 U.S. 940 (1990), and *Stough v. Crenshaw County Bd. of Educ.,* 744 F.2d 1479 (11th Cir.1984) (school board policy prohibiting employees from sending children to private schools interferes with employees' exercise of their constitutional right to control the education of their children). See also *Perry v. Sindermann,* 408 U.S. 593 (1972) (nonrenewal of teaching contract because of teacher's exercise of First Amendment rights violates the Constitution), and *Littlejohn v. Rose,* 768 F.2d 765 (6th Cir.1985) (refusal to rehire non-tenured teacher would violate constitutionally protected right of privacy if based on teacher's divorce), *cert. denied,* 475 U.S. 1045 (1986).

Here the district court justified its summary disposition of Mrs. Janes' §§ 1983 parental rights claim on the ground that the decision to hire a less experienced person was unquestionably economic in nature, there being no dispute that the board made it a practice to hire only persons with less than three years' experience. Upon *de novo* review of the record, however, we conclude that there is a genuine issue of fact as to the reason Mrs. Janes was not considered for the job.

The plaintiff's affidavit clearly supports an inference that she was deemed disqualified because she did not send her children to the public schools. And Mrs. Janes' statements are corroborated by an affidavit from one Lynn Bowling. Ms. Bowling states that Dr. Hagan told her, anent Mrs. Janes, that the school had an unwritten policy of not hiring people who sent their children to other school systems. An

affidavit executed by Linda Dickerson, a substitute aide in the Bardstown school system, also lends credence to Mrs. Janes' assertions. Ms. Dickerson states that when she sought a full-time teacher's aide position, Dr. Hagan told her that because her children attended parochial schools he could not help her obtain the position.

**3 It is true that if the school system actually did have a fixed policy against hiring anyone with more than three years' experience, the failure to hire Mrs. Janes could not have been "caused" by the exercise of her constitutionally protected familial rights. In that event her claim would fail regardless of what Dr. Hagan might have said to her. See *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 286-287 (1977). We do not believe, however, that the defendants have set forth sufficient evidence of such a policy to warrant summary judgment.

Mrs. Sparks stated that "usually" the school hired those "on the lower end of the ... salary scale." Defendant Robert Smotherman, the school superintendent, characterized lengthy teaching experience as a consideration "of major importance," but not the only consideration. Dr. Hagan stated that 71 percent of those hired in the last several years had no more than three years' experience. The evidence, as we read it, demonstrates only a preference for less expensive teachers, and not a firm bar to the hiring of more expensive teachers.

Nor does the statistical evidence relied upon by the defendants conclusively disprove Mrs. Janes' claim of impermissible discrimination. The statistics show that a large percentage of the public school employees are Catholics and that a number of the system's teachers send their children to parochial schools. What is not clear from the record, however, is how many of the applicants hired since Dr. Hagan's alleged policy supposedly went into effect were sending their children to parochial schools at the time they were hired.

The defendants assert that between June 1, 1991, and October 15, 1992 (the period deemed relevant for purposes of Mrs. Janes' EEOC complaint), the district hired 34 individuals; that 16 of the 34 were Catholic; that 5 of the 16 Catholics had school-age children; and that 4 of these sent their children to parochial schools. The plaintiff,

however, denies that one of these employees--Joey Downs--had his children in parochial schools at the time he was hired. Of the other three employees, she says that one was a cafeteria worker, one was a bus driver, and only one was a school teacher. If only one successful applicant for a teaching position had children in the parochial schools when she was hired, it does not seem to us that the statistics are all that helpful to the defendants.

III

Title VII makes it unlawful for an employer "to fail or refuse to hire ... any individual ... because of such individual's ... religion...." 42 U.S.C. §§ 2000e-2. The statute likewise makes it unlawful to "limit, segregate, or classify ... applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's ... religion...." *Id.*

We agree with the district court that there is no evidence here that the Bardstown school system had a practice of discriminating against Catholics. On the contrary, the record reveals that 40 percent of the system's employees are Catholics and that 48 percent of those hired between June 1, 1991, and October 15, 1992, are Catholics. Nor is there any evidence that Mrs. Janes individually was discriminated against because of her Catholic faith. Accepting the affidavits presented by Mrs. Janes at face value, they tend to show only that Bardstown school system excluded her from consideration because she sent her children to school elsewhere--not because she is a Catholic.

**4 It is true that Title VII defines religion broadly, extending protection to "all aspects of religious observance and practice, as well as belief...." 42 U.S.C. §§ 2000e(j). But the record before us does not demonstrate that in sending her children to parochial schools Mrs. Janes was engaging in the type of "observance or practice" entitled to protection under the Act. Neither does the record show that she was motivated by religious belief. She has presented no evidence that her faith calls upon her to patronize parochial schools. She and her husband may have made the choice they did for the purpose of obtaining a religious education for their children, as alleged in paragraph 11 of the verified complaint, but a preference for such an

education need not itself be an aspect of religious observance, practice, or belief.

IV

The court dismissed the ADEA claim on the ground that Mrs. Janes had not exhausted her administrative remedies. Under 29 U.S.C. §§ 626(d) a complaint must be filed with the EEOC within 180 days of an unlawful practice (or with the state agency within 300 days) in order to maintain a private action under the ADEA. Mrs. Janes did not complain of age discrimination to the EEOC during the applicable time period. There are no grounds for equitable tolling of the requirement, and the dismissal of the ADEA claim was proper.

Mrs. Janes may not bring her ADEA claim under §§ 1983. The detailed statutory remedy created by the ADEA constitutes the exclusive means for enforcement of the Act. See *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364, 1366-69 (4th Cir.), *cert. denied,* 493 U.S. 850 (1989).

V

The defendant board of education argues that it should be dismissed because it is not responsible for the actions of its employees and because it is entitled to Eleventh Amendment immunity.

For a school board to be found liable for the acts of an employee under §§ 1983, the acts of the employee must have been "in accordance with some official policy or custom of the board." *Kitchen v. Chippewa Valley Schs.,* 825 F.2d 1004, 1013 (6th Cir.1987), citing *Monell v. Department of Social Servs.,* 436 U.S. 658, 690-91 (1978). The district court did not reach the issue of whether such a policy or custom could be said to exist here, and we decline to decide the issue for the first time on appeal.

Similarly, we decline to decide for the first time on appeal the school board's entitlement to Eleventh Amendment immunity. The resolution of this question requires a fact-based inquiry into the structure of the Kentucky educational system, and it would be inappropriate for a court of appeals to make such a determination in

the first instance. See *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299 (6th Cir.1984), *cert. denied,* 469 U.S. 1113 (1985). We note, however, that three different federal district judges in Kentucky have examined the Kentucky educational scheme and concluded that school boards are not entitled to Eleventh Amendment immunity as agencies of the state. *Doe v. Knox County Bd. of Educ.,* 918 F.Supp. 181 (E.D.Ky.1996) (Coffman, J.); *Tolliver v. Harlan County Bd. of Educ.,* 887 F.Supp. 144 (E.D.Ky.1995) (Bertelsman, J.); *Blackburn v. Floyd County Bd. of Educ.,* 749 F.Supp. 159 (E.D.Ky.1990) (Hood, J.).

VI

**5 Because we have kept the plaintiff's action alive in regard to one of her federal claims, we must vacate the dismissal of the pendent state claims. On remand the district court may consider whether jurisdiction over those claims is appropriate in light of our decision here.

The dismissal of the plaintiff's claim for interference with her right to direct and control the education of her children and her pendent state claims is VACATED, and the case is REMANDED for further proceedings with respect to those claims. The district court's disposition of the remaining claims asserted by the plaintiff is AFFIRMED.

RALPH B. GUY, Jr., Circuit Judge, concurring in part and dissenting in part.

I concur in all of the court's opinion except its conclusion that plaintiff's §§ 1983 cause of action should be remanded for further proceedings.

Although plaintiff asserts multiple theories of action, this is a failure to hire case. Plaintiff claims she was not hired because her children attend parochial school. The defendants counter by claiming that she was not hired because another teacher who could do the job

equally well was hired at a lesser cost. As I view this record, plaintiff has failed to demonstrate that if allowed to go to trial she could prove the defendants' proffered reason for not hiring her was pretextual. Unless she can get over this hurdle, it is unnecessary to consider her constitutional theories. I would affirm the decision of the district court in its entirety.

C.A.6 (Ky.),1996.

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No. 04-1409

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In the Supreme Court of the United States

STEUBENVILLE CITY SCHOOLS; RICHARD LUCCI; DANIEL SPAHN; RUTH ANN BRUZZESE; WILLIAM KERR; WILLIAM HENDRICKS; RICHARD BEAL,
Petitioners,

v.

PATRICK BARRETT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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I. Respondent Has Not Demonstrated That the Sixth Circuit's Decision Does Not Conflict with the Decisions of the Fifth and Eleventh Circuit, and of this Court, All of Which Recognize That a Balancing Test Applies to the Question Whether a Constitutional Right Is Clearly Established.

The basis for the Sixth Circuit's decision below was the court's finding that (1) Respondent has alleged a violation of a constitutionally or statutorily protected right, and (2) the right was clearly established in the law such that a reasonable government official would have realized that his or her action was in violation of that right. See, Appendix B, 11a-16a. The Sixth Circuit did not employ the balancing test that this Court, the Fifth Circuit and the Eleventh Circuit have employed when passing on the constitutional rights of public employees. *See, Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984).

Respondent takes the position that each of the above cases was decided on its merits, and not at the summary judgment stage, and therefore none apply to the present inquiry. Respondent misses the thrust of Petitioner's argument. While the matter at hand was decided at the summary judgment stage, the Petition is directed to the narrow question whether a public official is entitled to qualified immunity. This narrow question requires a Court to decide "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether the right in question was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999), citing *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999).

Thus, the "clearly established" inquiry requires an analysis of the substantive law giving rise to the constitutional right in question. While the Sixth Circuit was not required to decide this case on its merits, the Court was required to take into consideration the substantive law surrounding its two guiding principles that (1) parents have a fundamental right to raise their children and (2) one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. *Id.*

In engaging in this inquiry, the Sixth Circuit made the blanket generalization that one's participation in constitutionally protected activity cannot be the sole basis for denying public employment. However, courts addressing the question whether it is unlawful to deny public employment based upon the decision to send one's child to private school have all employed a balancing test. *See*, *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985); and *Stough v. Crenshaw County Bd. Of Educ.* 744 F.2d 1479 (11th Cir. 1984).[1] As such, the Sixth Circuit's inquiry into the substantive law that speaks to the question whether the right in question in clearly established should have taken into account the balancing test employed by other Circuits.[2]

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[1] Following the alleged violation of Respondent's rights, the Fifth Circuit decided another case consistent with its holdings in *Fyfe* and *Brantley*. *See*, *Barrow v. Greenville Independent School Dist.*, 332 F.3d 844 (5th Cir. 2003).

[2] With reference to the balancing test in question, Respondent contends that Petitioners have never contended that they had a countervailing interest in not hiring Respondent. (See, Part III, Response to Petition). Respondent misses the point. The Petition centers around the narrow question whether Petitioner Lucci is entitled to qualified immunity, not the merits of the case.

Had it done so, the Court would have been forced to acknowledge that its conclusion, that one's participation in constitutionally protected activity cannot be the sole basis for denying public employment, was overly broad. The above cases clearly stand for the proposition that, in the specific context of denying public employment based upon the decision to send one's child to private school, a balancing test applies. Therefore, there are instances in which terminating public employment based upon the decision to send one's child to private school may be constitutional. This balancing test applies in the summary judgment phase as well as the trial phase. There is no basis for Respondent's argument that the controlling law should not be applied at the summary judgment phase in the qualified immunity context. In short, Respondent has not provided this Court with a compelling reason why the Sixth Circuit was justified in over looking the balancing test that this Court, and other Circuits, have applied.

II. Respondent Has Not Demonstrated That a Reasonable Public Official in the Absence of Sixth Circuit and Supreme Court Precedent, Can Reasonably Be Expected to Know That Two Complicated Constitutional Principles, Combined with a Complex Legal Balancing Test, Place Him on Notice That His Conduct May Be Unlawful.

As the Petition for Writ of Certiorari underscores, application of the Sixth Circuit's analysis below, presents for review the question whether the general principle that (1) a

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Petitioners have maintained throughout this litigation that, because a school district may have the right not to hire a teacher whose child attends private school, and because a balancing test must be employed to determine the question, it is inequitable to expect Petitioner Lucci to properly weigh the legal interests at issue.

parent has the right to direct his child's education, coupled with the general principle that (2) public employment cannot usually be denied based upon the employee's exercise of constitutional rights, require a reasonable public official to reach the conclusion that (3) a public school cannot require that it's employees enroll their children in the public schools. This analysis must be conducted while mindful of the fact that there is no Sixth Circuit precedent directly addressing the question whether a public school can require that it's employees enroll their children in the public schools, and that there is no Supreme Court precedent answering the same question.

As argued in the Petition, the Sixth Circuit's conclusions about the state of the law represent over-generalizations of constitutional principles. *See*, *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (recognizing that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State). *Kelley v. Johnson,* 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976) (upholding police regulations relative to length of a police officer's hair and other personal grooming matters, despite the freedom of expression); and *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714, 135 L Ed. 2d 834, 116 S. Ct. 2353 (1996), (further citations omitted), (recognizing that government officials may discharge public employees for refusing to support a political party or its candidates if political affiliation is a reasonably appropriate requirement for job in question).

Respondent does not provide to this Court any substantive response to the above cited precedent. Rather, Respondent relies upon the case law cited by the Sixth Circuit below in

support of its broad generalizations of constitutional principles. Aside from re-hashing those cases, Respondent makes no substantive attempt to demonstrate that the Sixth Circuit's decision was not an over-generalization of the law, especially in light of the *Yoder*, *Kelley* and *O'Hare* cases.

Respondent simply argues that precedent in the Sixth Circuit has put the issue to rest, citing the unpublished case of *Janes v. Bardstown City Sch. Bd. of Ed.*, 97 F.3d 1452, 1996 U.S. App. LEXIS 24997 (6th Cir. 1996). Respondent does not respond to Petitioner's citation to the Sixth Circuit's own rules, which state that reliance upon unpublished opinions is "disfavored" by Sixth Circuit, except for the limited purposes of establishing *res judicata*, estoppel, or the law of the case. See, 6 Cir. R. 28(g). Further, the *Janes* case involved a religious discrimination claim, not a parental rights claim. Respondent cannot rely on *Janes* as notice to Petitioner Lucci that his conduct might violate Respondent's parental rights.

Given the lack of relevant precedent, the Sixth Circuit's error below is apparent upon review of this Court's decision in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In *Anderson*, this Court explained that what "clearly established" means depends largely "upon the level of generality at which the relevant 'legal rule' is to be established." 483 U.S. at 639. "Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The right allegedly violated must be defined at the appropriate level of specificity before a Court can determine if it was clearly established. *Id.* at 641. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, ***not as a broad general proposition*** * * * ." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272. (Emphasis supplied). If the

law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based upon qualified immunity is appropriate. 533 U.S. at 202, citing *Malley*, *supra*, 475 U.S. at 341.

The applicable passage from *Anderson* highlights the error of the Sixth Circuit's decision below, as the *Anderson* Court explains that general principles of law, such as those employed by the Sixth Circuit, cannot form the basis for the finding of a clearly established right:

> * * * if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Respondents would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity to a rule of pleading. * * * It should not be surprising, therefore, that our cases establish that the right that the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

483 U.S. 635, 639-640, 107 S. Ct. at 3038-39.

In response to the above precedent, Respondent notes that *Anderson* also stands for the proposition that "the very action in question" need not have been ruled unconstitutional in order to place a reasonable public official on notice as to the unconstitutionality of his actions. While this is certainly true, *Anderson* clearly stands for the proposition that a reasonable public official must have fair notice that his action violates the

constitution. While the "very action in question" need not have been decided, this Court emphasized in *Saucier* and *Anderson* that broad general propositions cannot serve as the basis for personal liability on the part of a public official. The contours of the right in question must be sufficiently clear, such that reasonable public official is on notice that his conduct violates the right in question in this case. But the Sixth Circuit could not point to the contours of the right in question. It only cited to general propositions of law, and charged Petitioner with knowledge of same. To act at this level of generality abandons the "objective legal reasonableness" that is "the touchstone" of *Harlow*.

Further examination of this Court's precedent reveals support for Petitioner's position. In finding that a right in question is not clearly established, this Court has previously been persuaded by the fact that "the constitutional question presented by [the] case is by no means open and shut." *Wilson, supra.*, 526 U.S. 615. In *Wilson* this Court examined, *inter alia*, whether it was obvious from the general principles of the Fourth Amendment that the conduct of the defendant police officers in *Wilson* violated the Fourth Amendment. *Id.* at 615-16. The *Wilson* Court noted that, at the time of the alleged violation, there were no judicial opinions holding the practice in question to be unlawful. *Id.* at 616. The *Wilson* Court concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. The same analysis applies in the case at bar. If there is no precedent on point in the Sixth Circuit, and federal judges in other Circuits must employ a constitutional balancing test to decide cases such as this on their merits, it is unfair to subject a school superintendent to money damages for picking the losing side.

With reference to the above *Wilson* factors, Respondent misconstrues Petitioners' reliance on *Wilson* as an argument that Petitioner Lucci was not on notice that his actions were unconstitutional because, in Respondent's words, "there are no two judicial opinions holding the practice in question to be unlawful." Respondent's argument is based upon a misunderstanding of Petitioners' contention. The question is not whether there are two judicial opinions holding the practice in question to be unlawful. The question is whether the state of the law is such that Petitioner Lucci was fairly on notice that his conduct violated Respondent's rights. Respondent cannot present to this Court a compelling reason why this question should be answered in the affirmative.

III. Respondent Has Not Demonstrated That, for the Purposes of a Qualified Immunity Inquiry in the Context of an Action Brought under 42 U.S.C. § 1983, a Plaintiff Can Fairly Be Said to Have Alleged a Violation of a Constitutionally or Statutorily Protected Right Where That Right Is Not Asserted in the Complaint and Where Plaintiff Only Makes Passing Reference to the Right in a Reply Brief Filed in Opposition to a Motion for Summary Judgment.

Respondent takes the position that he has satisfied the first prong of the qualified immunity inquiry by alleging, through a passing reference in a brief, a claim for violation of his constitutional right to raise his child. Respondent claims that this approach to holding Petitioner Lucci liable for money damages is acceptable because it did not subject Petitioner to "undue prejudice." After months of discovery, numerous depositions, discovery closure and the filing of a motion for summary judgment, Respondent was able to add a claim at the summary judgment stage. This addition of a claim now subjects Petitioner Lucci to personal liability for a cause of

action that neither party contemplated prior to the filing of the motion for summary judgment. The undue prejudice of this scenario is obvious.

Respondent focuses on the procedural aspects of his added claim, and in doing so overlooks its relevance to the constitutional inquiry that is the thrust of the Petition. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). Decision of this purely legal question permits the courts to expeditiously weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend a suit on the merits. *Id.* The "desirability of this approach" is apparent where the plaintiff fails "to establish the violation of any constitutional right at all." 500 U.S. at 233.

Respondent never even attempted to establish a violation of his constitutional right to direct his child's education. The trial court attempted to do it for Respondent when it decided the summary judgment motion. To impose personal liability upon Petitioner Lucci relative to this added claim would be an affront to this Court's precedent, which emphasizes the desirability of "weeding out" the qualified immunity issue where the violation of a constitutional right has not properly been claimed.

CONCLUSION

Contrary to Respondent's assertions, this case presents legal questions regarding whether Petitioner Lucci should be protected by qualified immunity, not factual questions about

the merits of the case. The question whether the constitutional right to direct the education of one's child has been clearly established in this school employment context, which requires a balancing of interests test, is exceptionally important: it may have a widespread impact on the educational system in this country, and has not yet been addressed by this Court. The Fifth and Eleventh Circuits are the only jurisdictions with established precedent on point. The Sixth Circuit has now weighed in on the issue, but on a conflicting legal basis, disregarding the accepted "balancing test." The remainder of the Circuits are apparently silent. In light of this exceptional importance, and for all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,

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